TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted] 228

STANDARD COMPUTING SCALE COMPANY, LIMITED, APPELLANT,

vs.

JOHN F. FARRELL, AS STATE SUPERINTENDENT OF WEIGHTS AND MEASURES OF THE STATE OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 24, 1917.

(26,057)

(26,057)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 590.

STANDARD COMPUTING SCALE COMPANY, LIMITED, APPELLANT,

vs.

JOHN F. FARRELL, AS STATE SUPERINTENDENT OF WEIGHTS AND MEASURES OF THE STATE OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 United States District Court, Southern District of New York.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant-appellant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant-appellee.

It is hereby stipulated and agreed by and between the solicitors for the respective parties hereto, that the transcript of the record to be filed by the Clerk of this Court, upon the appeal taken herein by Standard Computing Scale Company Limited, the complainant, duly allowed, shall contain the following papers and proofs, and no other papers, proofs or exhibits filed in the above-entitled proceeding;

Bill of complaint, filed February 9, 1915;

Subpœna ad respondendum and return filed February 19, 1915;

Defendant's answer, filed April 10, 1915;

Transcript of testimony taken before Judge Hough on the trial of the action and depositions of witnesses marked in evidence at such trial.

Complainant's exhibit 1, complete (marked in evidence before Charles J. Herrick, Notary Public, on the 3d day of June, 1915, and filed with depositions of witnesses on June 7, 1915);

2 Complainant's exhibits 2, 3, 4, 5, 6, 7, 8 and 9 marked in evidence before Charles J. Herrick, Notary Public, on the 3d day of June, 1915, and filed with depositions of witnesses on June 7, 1915.

Complainant's exhibit 10, marked in evidence on the 4th day of June, 1915, and filed with depositions of witnesses on June 7, 1915.

Complainant's exhibits C, D and E, marked in evidence December 9, 1915, filed January 10, 1916.

Complainant's exhibits I and J, marked in evidence December 9, 1915, filed December 22, 1915.

Complainant's exhibit K, marked in evidence December 9, 1915, filed May 2, 1916.

Defendant's exhibit 1, marked in evidence December 8, 1915, filed January 10, 1916.

Opinion of Hough, J., filed January 10, 1916.

Decree filed February 8, 1916.

Petition for appeal to the United States Supreme Court and allowance thereof, filed April 3, 1917.

Assignment of errors, filed April 3, 1917.

Citation on appeal, filed April 3, 1917.

Bond on appeal, filed April 10, 1917.

Order extending complainant's time to file a transcript of the record and docket the case in the United States Supreme Court,

dated April 18, 1917, and affidavit upon which said order was granted, verified by Herbert C. Smyth, April 18, 1917.

Order extending complainant's time to file a transcript of the record and docket the case in the United States Supreme Court, dated May 29, 1917, and affidavit upon which said order was granted, verified by Herbert C. Smyth, May 28, 1917.

And it is further stipulated and agreed, that such transcript as so made up as aforesaid, shall be sufficient to present the
3 questions specified by the appellant in its assignment of errors.

Dated, New York, June 18th, 1917.

WELLMAN, GOOCH & SMYTH,
Solicitors for Complainant-applt.
MERTON E. LEWIS,
Solicitor for Defendant-appellee.
E. G. G.

4 [Endorsed:] County Clerk's Index No. —. Year 191-. United States District Court, Southern District of New York. Standard Computing Scale Company, Ltd., Com.-applt. against John F. Farrell, etc., Defendant-appellee. Stipulation as to contents of record.

Wellman, Gooch & Smyth, Solicitors for com.-applt., No. 15 Wall Street, New York City. Filed June 21, 1917.

5 *Bill of Complaint.*

Filed Feb. 9, 1915.

12 Eq. 147.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant.

6 *Bill of Complaint.*

In the District Court of the United States for the Southern District of New York.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Standard Computing Scale Company, Limited, an incorporated partnership association organized and existing under and by

virtue of Act No. 191 of the Public Acts of the State of Michigan of 1877, having its principal place of business in the City of Detroit, County of Wayne, and State of Michigan, brings its bill of complaint against John F. Farrell, residing at No. 171 West 31st Street, in the Borough of Manhattan, City of New York, in the Southern District of New York, who is State Superintendent of Weights and Measures of the State of New York; and thereupon your orator alleges, upon information and belief, and complains:

7 I. That your orator is, and for the last six years has been, engaged in the business of manufacturing and vending spring computing scales, and is the owner and manufacturer of a spring computing scale known as the "Twentieth Century Automatic Computing Scale," which is designed and is used for weighing commodities purchased by the public in stores, such as meats, groceries and all other articles of merchandise which are sold by weight.

II. That said Twentieth Century Scale, which is manufactured by your orator in the State of Michigan, now has and for a long time past, has had a wide sale throughout the United States, and that a great number of such scales has been sold and is in use in the State of New York as well as in other states of the Union and in that regard your orator is and has been engaged in Interstate Commerce.

III. That the manufacture and sale of said "Twentieth Century Automatic Computing Scale" as heretofore conducted and now conducted by your orator, has yielded and continues to yield to your orator a fair profit. That by the practice of industry and economy and by judicious management of its affairs, the directors of your orator have built up a prosperous business, so that the shareholders of your orator are possessed of valuable property rights in the said "Twentieth Century Automatic Computing Scale," and in the patents covering the same.

IV. That the said Twentieth Century Scale is a scale which automatically computes values, registering the prices which the customer is to pay for the commodity weighed upon it.

8 V. That your orator's scale is manufactured with the utmost care and precision, of the best materials of standard quality and has always proved to be accurate and free from error.

VI. That the defendant was duly appointed State Superintendent of Weights and Measures ,and that he entered upon the duties of said office March 28th, 1914 .

VII. That Article 2, Chapter 20 of the Consolidated Laws of the State of New York as amended by Chapter 187 of the Laws of 1910, provides as follows:

"Section 11. Duties of state superintendents of weights and measures. The state superintendent of weights and measures shall take charge of the standards adopted by this article as the standards of the state; cause them to be kept in a fire-proof building belonging to the state, from which they shall not be removed, except for repairs or for certification, and take all other necessary precautions for their safekeeping. He shall maintain the state standards in good order and shall submit them once in ten years to the national bureau of standards for certification. He shall correct the standards of the several

cities and counties, and, as often as once in five years, compare the same with those in his possession, and where not otherwise provided by law he shall have a general supervision of the weights, measures and measuring and weighing devices of the state, and in use in the state. He shall upon the written request of any citizen, firm,
9 corporation or educational institution of the state, test or calibrate weights, measures, weighing or measuring devices and instruments or apparatus used as standards in the state. He, or his deputies or inspectors by his direction, shall at least once annually test all scales, weights and measures used in checking the receipt or disbursement of supplies in every institution under the jurisdiction of the fiscal supervisor of state charities and he shall report in writing his findings to said fiscal supervisor and to the executive officer of the institution concerned; and at the request of said officers the superintendent of weights and measures shall appoint in writing one or more employees, then in actual service, of each institution, who shall act as special deputies for the purpose of checking the receipt or disbursement of supplies. He shall keep a complete record of the standards, balances and other apparatus belonging to the state and take receipt for the same from his successor in office. He shall annually during the first two weeks of January make to the legislature a report of the work done by his office. The state superintendent, or his deputies or inspectors by his direction, shall inspect all standards used by the counties or cities at least once in two years and shall keep a record of the same. He, or his deputies or inspectors at his direction, shall at least once in two years visit the various cities and counties of the state in order to inspect the work of the local sealers and in the performance of such duties he may inspect the weights, measures, balances or any other weighing or measuring appliances of any person, firm or corporation.

10 Section 13. County sealer; duties of county sealer; duty of supervisors. There shall be a county sealer of weights and measures in each county, who shall be appointed by the board of supervisors and hold office during the pleasure of such board. He shall be paid a salary determined by the board of supervisors and shall be provided by them with the necessary working equipment of standard weights and measures. He shall take charge of and safely keep the county standards. Where not otherwise provided by law, the county sealers shall have the power within his county to inspect, test, try and ascertain if they are correct, all weights, scales, beams, measures of every kind, instruments or mechanical devices for measurement and the tools, appliances or accessories connected with any or all such instruments or measurements used or employed within the county by any proprietor, agent, lessee or employee in determining the size, quantity, extent, area or measurement of, quantities, things, produce, articles for distribution or consumption offered or submitted by such person or persons for sale, for hire, or award. He shall at least twice in each year and as much oftener as he may deem necessary see that the weights, measures and all apparatus used in the county are correct. He may for the purposes above mentioned, and in the general performance of his official duties, enter or go into

or upon and without formal warrant, any stand, place, building or premises or may stop any vendor, peddler, junk dealer, coal wagon, ice wagon or any dealer whatsoever, for the purposes of making the proper tests. Whenever the county sealer finds a violation of
11 the statutes relating to weights and measures he shall cause the violator to be prosecuted. The county sealer shall keep a complete record of the work done by him and shall make an annual report to his board of supervisors, and an annual report, duly sworn to, not later than the first of December to the state superintendent of weights and measures. The county sealer of weights and measures shall forthwith on his appointment give a bond, with sureties to be approved by the appointing power, for the faithful performance of the duties of his office and for the safety of the local standards and such appliances for verification as are committed to his charge and for the surrender thereof immediately to his successor in office or to the person appointed by the proper authority to receive them.

Section 15. City sealer. There shall be a city sealer of weights and measures to be appointed by the mayor with the approval of the common council of each city. He shall be paid a salary to be fixed and determined by the board or body authorized to determine salaries of city officials, and no fees shall be charged or received by him or by the city for the inspection or testing of weights, measures or weighing or measuring devices. He shall perform in his city the duties of and have like powers as a county sealer in a county. This section shall not apply to the city of New York."

VIII. That the defendant herein, purporting to act under
12 the authority of his office and upon the pretext of enforcing said sections 11, 13 and 15 hereinabove set forth, has, without right or authority, adopted and promulgated to the public, to his deputies and inspectors, and to all county sealers and city sealers, a rule referring to the sealing of computing scales, which reads as follows:

"Automatic Computing Scales.

All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance and throughout the whole range of weight gradations."

IX. That the Attorney General of the State of New York has rendered an opinion in the year 1911 as recorded in Reports of Attorney General, Vol. 2, page 661, construing the effect of said Section 11 of the General Business Law of New York, stating that the scheme of the statute is, that the County and City Sealers shall enforce the observation by individuals of the standards of weights and measures, and that the State Superintendent shall enforce the performance of this duty by the County Sealers and City Sealers.

X. That the said County and City Sealers have been and are obeying the rules and directions of the defendant pursuant to the authority of said Section 11, as construed as aforesaid by the Attorney General, and that the defendant adopted and promulgated the

rule above set forth pursuant to the claimed authority of said Section 11 as construed by the Attorney General as aforesaid.

XI. That the said rule and the enforcement thereof, is not a valid exercise of the Police Power of the State of New York, in that
13 it unjustly discriminates between the scale manufactured by your orator and those of other manufacturers, impairs the obligation of contract in violation of Section X of Article 1 of the Constitution of the United States, and deprives your orator of its property without due process of law and takes away its property without just compensation, and does not afford your orator the equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States, and interferes wih Interstate Commerce carried on by your orator as above set forth, in that it prevents your orator from placing upon the market within the State of New York a true, correct and accurate scale with a computing device, and prevents the customers of your orator from using said scales already sold, and interferes with the collection by your orator of moneys due to it under contracts with said customers upon conditional bills of sale of said scale as is more particularly hereinafter set forth.

XII. That the defendant herein, purporting to act under the authority of his office and upon pretext of enforcing sections 11, 13 and 15 hereinabove set forth, has, without right, instructed and commanded his deputies and inspectors, and the various County Sealers and City Sealers of weights and measures to refuse to seal the scale of your orator and to prevent its use throughout the State of New York; and that the aforesaid deputies and inspectors of defendant, the County Sealers and City Sealers and their deputies, have refused to seal the scale of your orator in the several counties of the said State, and have threatened and are now threatening to prose-
14 cute criminally the proprietors of said Twentieth Century Scale, and have been and are now forbidding the use of such scale.

XIII. That the alleged reason for the aforesaid acts of the defendant, his deputies, inspectors, the County Sealers and City Sealers acting under his instructions, is that the scale of your orator is not equipped with an automatic compensating device to control variations in the springs due to changes in temperature.

XIV. That the scales of your orator sold and now in use in the State of New York are all equipped with adequate devices for correcting inaccuracies caused by the expansion *of* contraction of springs due to atmospheric changes, such device consisting of a screw adjustment, mechanically operated, which by turning to the right or left, changes the travel on the rack rod, thereby causing the scale to conform to balance with the weight indicator and the value indicator at the zero point.

XV. That the defendant has allowed and is now allowing to be used within the State of New York various spring scales not having an automatic compensating device to control variations in spring due to changes in temperature and that defendant has approved the use of such other spring scales causing and directing his deputies and inspectors and the County Sealers and City Sealers of the

several counties and cities of said State to seal such other scales and pronounce them accurate.

XVI. That the computing part of your orator's scale has nothing to do with the scale itself, is not itself affected by any atmospheric change directly or affected, in any case, by the contracting
15 or expansion of the spring except insofar as the weight indicating part controls the computation part; and that the various spring scales in use in the State of New York with the approval of the defendant and by defendant's direction pronounced by the various County Sealers and City Sealers of weights and measures as accurate, are not equipped with an automatic compensating device to control variations in springs due to changes in temperature, though operated upon substantially the same principle as your orator's scale, as far as the use of springs is concerned, being, therefore, equally subject to variation on account of changes in temperature.

XVII. That the refusal of defendant to allow the scales manufactured by your orator to be sealed pursuant to said Section 15 of Article 2, Chapter 20 of the Consolidated Laws, heretofore set forth, and the prevention of the sale and use of your orator's scales throughout the State of New York, while at the same time numerous scales of other manufacturers, operating upon substantially the same principles as your orator's scales, equally subject to variation on account of temperature changes, in many cases of inferior accuracy and lacking an automatic compensating device to control variations due to atmospheric changes, or without any compensating device of any kind, has deprived and is depriving, your orator of a market for its scales in the State of New York and of the profit which the sale of its scales within said State would yield, and fails to accord to your orator equal protection of the laws and violates the Fourteenth Amendment to the Constitution of the United States, as aforesaid, and is an interference with the Interstate Commerce carried on by your orator as above set forth.

16 XVIII. That the only other computing spring scale of standard quality in use in the State of New York is a computing scale manufactured and sold by a corporation known as The Computing Scale Company of Dayton, Ohio.

XIX. That the scale of The Computing Scale Company of Dayton, Ohio, aforesaid, is purported to be equipped with an automatic compensating device to control variations due to atmospheric changes, and that said The Computing Scale Company of Dayton, Ohio, is the owner of an exclusive patent covering such device, known as the Osias Patent, which will not expire until April, 1917.

XX. That the automatic device attached to the scale of The Computing Scale Company of Dayton, Ohio, aforesaid, has failed and does fail to, and cannot and does not, provide for all error in its scale caused by atmospheric changes, and is not so efficient as the compensating device attached to your orator's scale; that frequently it requires readjustment, which adjustment is a more difficult process, requiring more skill and a longer time than any adjustment of your orator's scale which might be necessary.

XXI. That defendant has allowed the sale and use of the scale of The Computing Scale Company of Dayton, Ohio, aforesaid, within the State of New York and has caused the scales of such company in use within said state to be sealed by his deputies and inspectors and County and City Sealers of Weights and Measures in the several counties and cities of the state, and such scales have been pronounced correct by such deputies and inspectors of defendant and by the County Sealers and City Sealers.

17 XXII. That because of the exclusive patent covering the scale of the Computing Scale Company of Dayton, Ohio, aforesaid, such company manufactures the only computing spring scale whose use within the State of New York, defendant allows, and that although your orator's scale is of equal, if not superior, accuracy, your orator's scale is not permitted to be used in said state.

XXIII. That your orator is the only serious competitor of The Computing Scale Company of Dayton, Ohio, aforesaid, whose scale is not approved by defendant and that defendant's denial of your orator's right to sell its scale within the State of New York, while permitting the sale and use of the scale of The Computing Scale Company of Dayton, Ohio, deprives your orator of the equal protection of the laws, takes your orator's property without due process of law, and is in violation of the Fourteenth Amendment to the Constitution of the United States, and is an interference with Interstate Commerce.

XXIV. That prior to the refusal of defendant to allow the use of your orator's scale within the State of New York, your orator has sold many scales throughout said State and that such scales are now in use therein.

XXV. That your orator has sold numerous scales to purchasers in this state, and upon the installment plan, contracting with the vendee of such scale to allow the vendee the use thereof until such time as the full purchase price of such scale should be paid, the vendee agreeing to pay your orator equal installments at stated periods of time, until the full price of the scale was aggregated.

18 XXVI. That there are now in force many such conditional sale contracts within the State of New York and that there are large sums of money now owing to your orator for and on account of such contracts.

XXVII. That the defendant has caused his deputies and inspectors and the various County Sealers and City Sealers of Weights and Measures in the several counties and cities of this state to condemn a large number of scales so sold by your orator upon such conditional sale contracts and has forbidden the use of such scales, threatening the conditional vendees of your orator's scales with criminal prosecutions if they continued the use of their scales.

XXVIII. That, intimidated by such threats, such vendees of your orator's scales have discontinued and are about to discontinue the use of their scales and have refused to make further payments to your orator which are now due and owing for and on account of their contracts, and that such vendees have demanded and are de-

manding the return of all moneys heretofore paid to your orator under and by virtue of such contracts.

XXIX. That the refusal of defendant to permit the use of your orator's scales by these conditional vendees, deprives your orator of its property without due process of law, interferes with your orator's contract rights, impairs the obligation of contracts heretofore entered into, and is in violation of the Fourteenth Amendment and of Section X of Article 1 of the Constitution of the United States, and is an interference with Interstate Commerce.

19 XXX. That your orator is without any adequate remedy at law for the injuries herein complained of and must seek redress of its wrongs in a court of equity.

Therefore, that your orator may have that relief which it can only obtain in a court of equity, and that the defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is hereby waived by your orator, it now prays:

1. That it be adjudged and decreed that the rule, above set forth, adopted and promulgated by defendant, which requires an automatic compensating device on all spring computing scales, is an invalid exercise of the Police Power of the State of New York, in that it unjustly discriminates between the scale manufactured by your orator and the scales of other manufacturers, that it impairs the obligation of contract in violation of Section X of Article 1 of the Constitution of the United States, and deprives your orator of its property without due process of law and takes away its property without just compensation, and does not afford your orator the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States, and that it interferes with Intertsate Commerce, and that it abridges the privileges and immunities which, as a citizen of the United States, are guaranteed to your orator by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

2. That it be adjudged and decreed that the refusal of the defendant to allow his deputies and inspectors and the various county sealers and city sealers of the several counties and cities of the State

20 of New York to seal the scales manufactured by your orator, and the direction of his deputies and inspectors and of such county sealers and city sealers to condemn such scales and prosecute their proprietors, is illegal and without right or authority of law, because in contravention of the Fourteenth Amendment of the Constitution of the United States, as aforesaid, and of Section X of Article 1 of the Constitution of the United States, in that it impairs the obligation of the contract rights of your orator, deprives your orator of its property without due process of law, takes away its property without just compensation, and interferes with Interstate Commerce.

3. That it be adjudged and decreed that your orator has no adequate remedy at law, for the injury which should result from the threatened acts of the defendant, his deputies and inspectors and the various county sealers and city sealers of weights and measures, in the several counties and cities of the State of New York, acting pur-

suant to defendant's direction, and that such injury would be irreparable.

4. That it be adjudged and decreed that your orator, be granted writs, both temporary and permanent, of injunctions, issuing out of and under the seal of this Honorable Court against the defendant, restraining him, his deputies, officers, agents, servants and employees, and any and all persons acting under and by virtue of defendant's authority, from directing or commanding that the users of your orator's scales be prosecuted either criminally or civilly, or be prevented from using the same in their business, and from directing or commanding or in any way allowing defendant's deputies
21 and inspectors and the various county sealers and city sealers of weights and measures of the State of New York to refuse to seal the scales of your orator now in use in said state, and that under and by virtue of Section 718 of the Revised Statutes, a restraining order may be granted against the defendant, his deputies, officers, agents, servants and employees and any and all persons acting under and by virtue of defendant's authority, restraining them as herein stated, until your Honorable Court so determines, upon motions and hearings, whether a temporary injunction with limited effect, shall be granted pendente lite.

5. Your orator further prays that if, at any time hereafter and prior to the final hearing hereof, any person or persons in the State of New York, shall attempt to prosecute or otherwise interfere with the users of your orator's scales in said state, such persons or some of them on behalf of all, be made parties defendant hereto, and each of them be enjoined and restrained as heretofore prayed; that your orator have such other, further and different relief as to the Court may seem meet, and the nature of the case may require.

6. Your orator further prays that your Honors grant unto your orator a writ of subpœna ad respondendum, issuing out of and under the seal of this Honorable Court, to be directed to said defendant, commanding him, on a certain day and under a certain penalty, to be therein answered, to appear before your Honors of this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further, to stand, do, perform and abide by such order and decrees as to your Honors may
22 seem meet; and also that a writ of provisional injunction to the same purport, tenor and effect as hereinabove set forth and appears, be granted during the pendency of this action.

Your orator will ever pray, etc.,

STANDARD COMPUTING SCALE COMPANY, LTD.,

By THOMAS F. COMERFORD, *President.*

WELLMAN, GOOCH & SMYTH,
Solicitors for Plaintiff.

15 Wall Street, New York City.

HERBERT C. SMYTH, Esq., *Of Counsel.*

STATE OF MICHIGAN,
County of Wayne, ss:

Thomas F. Comerford, being duly sworn, deposes and says that he is the President of the complainant herein; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by complainant is that the complainant is an incorporated partnership association; that the source of deponent's information
23 and the grounds of his belief are, documents in his possession and personal knowledge.

THOMAS F. COMERFORD.

Sworn to before me this 2nd day of February, 1915.

[SEAL.] GEORGE E. REUTON,
Notary Public, Wayne County, Michigan.

My Commission expires June 14th, 1915.

24 *Subpœna ad Respondendum.*

The President of the United States of America to John F. Farrell, as State Superintendent of Weights and Measures of the State of New York, Greeting:

You are Hereby Commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity by Standard Computing Scale Company, Limited and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of Two Hundred and Fifty — ($250).

Witness Honorable Chas. M. Hough, Judge of the District Court of the United States for the Southern District of New York on the ninth day of February in the Year One Thousand Nine Hundred and Fifteen and the Independence of the United States of America the One Hundred and Thirty-eighth.

ALEX GILCHRIST, JR., *Clerk.*

WELLMAN, GOOCH & SMYTH,
15 *Wall St., Sol'rs.*

The defendant is required to file his answer or other defense in the above cause in the clerk's office of this Court on or before the

twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX GILCHRIST, JR., *Clerk.*

Filed Feb. 19, 1915.

25 [Endorsed:] United States District Court, Southern Distric of New York.

Standard Computing Scale Company, Limited, Complainant, against John F. Farrell, as State Superintendent of Weights and Measures of the State of New York, Defendant. Subpœna ad Respondendum.

26 *Answer.*

Filed April 10, 1915.

27 *Answer.*

In the District Court of the United States for the Southern District of New York.

STANDARD COMPUTING SCALE COMPANY, LTD., Complainant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant.

John F. Farrell, State Superintendent of Weights and Measures of the State of New York and the defendant above-named, answering the bill of complaint herein states as follows:

28 1. I deny the allegations made in the paragraph marked "I" of the bill of complaint herein, that the Twentieth Century Automatic Scale is a spring computing scale.

The Twentieth Century Automatic Computing Scale is a combined spring and lever scale and is designed and used for determining the price of commodities sold by weight and the amount or quantity of a commodity to be delivered to a customer where the amount or quantity is to be measured by value, as well as for the purpose, as stated in said paragraph of the bill of complaint herein, of weighing commodities purchased by the public in stores, such as meats, groceries and all other articles of merchandise which are sold by weight.

Such other allegations in the said paragraph of the bill of complaint as are not so denied or explained are admitted.

2. I am without knowledge of the truth of the allegations made in the paragraphs of the bill of complaint herein marked "II" and "III."

3. Although admitting the allegations made in the paragraph of the bill of complaint herein marked "IV," I specifically deny the implication that the Twentieth Century Scale is a scale which auto-

matically computes correctly values, registering the price which the customer is to pay for the commodity weighed upon it.

4. I deny the allegations contained in the paragraph of the bill of complaint herein marked "V." Many elements producing error enter into the construction and operation of this scale.

29 5. I admit the allegations contained in the paragraph of the bill of complaint herein marked "VI," except that I entered upon my duties as State Superintendent of Weights and Measures on April 1, 1914.

6. I admit that the provisions of Sections 11 and 13 of the General Business Law are correctly set forth in the paragraph of the bill of complaint herein marked "VII," but the section of the statute numbered "15" should be numbered "14."

Section 15 provides as follows:

"Section 15. Weights and measures to be sealed. Whenever the sealer of a city or county compares weights and measures and finds that they correspond or causes them to correspond with the standards in his possession, he shall seal and mark such weights and measures with the appropriate devices."

Section 12 of the General Business Law and Article 216 of the Penal Law of the State of New York are also material as indicating the scope of the duties of the State Superintendent of Weights and Measures. They provide:

"Section 12. Copies of standard weights and measures. The state shall have a complete set of copies of the original standards of weights and measures adopted by this article, which shall be used for adjusting county standards, and the original standards shall not be used except for the adjustment of this set of copies and for scientific purposes.

30 The state superintendent of weights and measures shall see that the foregoing provisions of this section are complied with and procure such apparatus and fixtures, if the same have not already been procured, as are necessary in the comparison and adjustment of the county standards.

He shall cause all the city and county standards to be impressed with the emblem of the United States, the letters "N. Y." and such other devices as he shall direct for the particular county" (General Business Law).

Article 216 of the Penal Law:

"Section 2410. Requiring more than the legal weight of a bushel. Where potatoes, grains or other agricultural product- are sold by the bushel, without agreement as to the weight, any person requiring a greater number of pounds for a bushel than as prescribed by section eight of the general business law is guilty of a misdemeanor.

"Section 2411. Using false weights and measures. A person who injures or defrauds another by using, with knowledge that the same is false, a false weight, measure, or other apparatus, for determining the quantity of any commodity, or article of merchandise, or by knowingly delivering less than the quantity he represents, is guilty of a misdemeanor.

"Section 2412. Keeping false weights and measures. A person

who retains in his possession any weight or measure, knowing it to be false, unless it appears beyond a reasonable doubt that it
31 was so retained without intent to use it, or permit it to be used in violation of the last section, is guilty of a misdemeanor.

"Section 2413. False weights and measures authorized to be seized. A person who is authorized or enjoined by law to arrest another person for a violation of the last two sections, is equally authorized and enjoined to seize any false weights or measures found in the possession of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

"Section 2414. Weights and measures may be tested by committing magistrate and destroyed or delivered to district attorney. The magistrate to whom any weight or measure is delivered pursuant to the last section, must, upon the examination of the defendant, or if the examination is delayed or prevented, without awaiting such examination, cause the same to be tested by comparison with standards conformable to law; and if he finds it to be false, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice in his judgment require.

"Section 2414-*a*. Presumption of knowledge. The possession or use by any person of any false weight, measure or other apparatus for determining the quantity of any commodity or article of merchandise is presumptive evidence of knowledge by such person of the falsity of such weight, measure or other apparatus.

"Section 2415. False weights and measures to be destroyed
32 after conviction of offender. Upon the conviction of the defendant, the district attorney must cause any weight or measure in respect whereof the defendant stands convicted, and which remains in the possession or under the control of the district attorney, to be destroyed.

"Section 2416. Stamping false weight or tare on casks or packages. A person who knowingly marks or stamps false or short weights, or false tare on any cask or package, or knowingly sells or offers for sale any cask or package so marked, is guilty of a misdemeanor.

"Section 2417. Regulation for sale of baled hay and straw. A person who:

1. Sells or offers for sale baled hay or straw containing more than twenty pounds of wood to the bale, the weight of which is two hundred pounds or upward, or more than ten pounds of wood to the bale the weight of which is less than two hundred pounds; or,

2. Sells or offers for sale any bale of hay or straw upon which the correct gross weight is not plainly marked or which weighs more than five pounds less than the gross weight so marked thereupon.

Is guilty of a misdemeanor."

7. I admit the allegations made in the paragraph of the bill of complaint herein marked "VIII" that I adopted and published to the county and city sealers of weights and measures of the State of New York the rule which is correctly set forth in the said

33 paragraph of the bill of complaint herein. All other allegations in said paragraph not so admitted are denied.

8. I admit the allegations made in the paragraph of the bill of complaint herein marked "IX." The entire opinion is as follows:

"General Business Law—State Superintendent of Weights and Measures—Authority—Standards.

The State Superintendent of Weights and Measures has authority to instruct the weights and measures officials of the counties and cities of the State to maintain the standards of weights and measures established by the General Business Law in this State, and it is his duty so to do.

Inquiry.

Has the State Superintendent of Weights and Measures authority, under the General Business Law, to insist upon the maintenance by the county and city weights and measures officials of the standards of weights and measures adopted by the State, and, in particular, has he authority to establish and maintain the size of the measure by which hops are measured, being the manner in which laborers are paid for picking hops?

Opinion.

The General Business Law, as amended by chapter 187 of the Laws of 1910, prescribes the standard of weights and meas-
34 ures to be observed in this State. Section 11 of that act prescribes the duties of the State Superintendent of Weights and Measures, and directs him to take charge of and keep the standards adopted by the State. He is required to correct the standards of the several cities and counties as often as once in five years. Upon the written request of any citizen, firm, corporation or educational institution of the State, test or calibrate weights, measures, weighing or measuring devices and instruments or apparatus used as standards in the State.

The section further provides:

'The State Superintendent, or his deputies or inspectors by his direction, shall inspect all standards used by the counties or cities at least once in two years and shall keep a record of the same. He, or his deputies or inspectors at his direction, shall at least once in two years visit the various cities and counties of the State in order to inspect the work of the local sealers and in the performance of such duties he may inspect the weights, measures, balances or other weighing or measuring appliances of any person, firm or corporation.'

The duty of inspecting the weights and measures in the different cities and counties of the State is also imposed upon the city and county sealers, whose duties are prescribed by subsequent sections of

the statute. In reference to county sealers, section 13 provides that, when they find a violation of the statute relating to weights and measures, they shall cause the violator to be prosecuted.
35 County sealers are required also to make an annual report to the State Superintendent.

Section 15 provides that city sealers shall perform their duties and have like powers as county sealers.

The scheme of the statute is that the county and city sealers shall enforce the observation by individuals of the standards of weights and measures, and that the State Superintendent shall enforce the performance of this duty by the county sealers and city sealers. While there is no express provision of law as to the manner in which the State Superintendent shall enforce the performance of their statutory duty by the county and city sealers, yet his general powers of supervision over them and over the standards of the State are sufficient to support his authority to direct them in the performance of their duties and to insist that the mandates of the statute be observed.

It appears that complaint is made about the size of hop boxes in which hops are picked and measured, so as to determine the wages of laborers, the laborers being paid so much per box. Upon complaint being received in writing, the State Superintendent of Weights and Measures should call the attention of the county sealer to this complaint and insist that its violation be corrected, as empowered by the statute, or that the violators be punished as therein prescribed.

Dated, November 10, 1911.

THOMAS CARMODY,
Attorney General.

To Hon. Fritz Reichmann, State Superintendent of Weights and Measures, Albany.

36 9. I am without knowledge sufficient to form a belief of the truth of the allegations made in the paragraph of the bill of complaint herein marked "X" as to the obedience of the rule by the local sealers. I admit the other allegations in said paragraph contained.

10. I deny each and every allegation made in the paragraph of the bill of complaint herein marked "XI."

11. I deny the allegations made in the paragraph of the bill of complaint herein marked "XII" as follows:

"That the defendant herein, purporting to act under the authority of his office and upon pretext of enforcing sections 11, 13 and 15 hereinabove set forth, has without right, instructed and commanded his deputies and inspectors, and the various county sealers and city sealers of weights and measures to refuse to seal the scale of your orator and to prevent its use throughout the State of New York."

I am without knowledge of the allegations contained in said paragraph as follows:

"and that the aforesaid deputies and inspectors of defendant, the county sealers and city sealers and their deputies, have refused to seal the scale of your orator in the several counties of the said state, and have threatened and are now threatening to prosecute criminally the proprietors of said Twentieth Century Scale, and have been and are now forbidding the use of such scale."

37 12. I am without knowledge of the reasons for the alleged acts of the county and city sealers as set forth in the paragraph of the bill of complaint herein marked "XIII." That my reasons for publishing the rule set forth in the paragraph of the bill of complaint herein marked "VIII" are as follows: The accuracy of combination spring and lever scales is affected by temperature. A thermostatic compensating device, operated manually by the merchant or owner, as the scale varies from time to time, facilitates fraud on the public; that by public authority in Cincinnati, Ohio, Boston, Mass., and by rule of the Department of Inland Revenue, Ottawa, Canada, the use of the scale of the complainant herein is prohibited. Further, the Twentieth Century Automatic Computing Scale of the complainant herein is manufactured with certain ingenious concealed devices which, in combination with the manual compensating device also facilitates fraud on the public. I further say that the scale of the complainant herein is so devised that to seal it would be a useless formality, and give a sanction to the scale which would result in deceiving the public as to its real merits, since at any time it may be tampered with and immediately remedied without apparent evidence of such changes at any time.

A scale such as is submitted by the Standard Computing Scale Company, Ltd., the complainant herein, having on it a device whereby the nose-iron or bar at the end of the long lever can be changed at the will of the operator, is most vicious as it affords a ready accessible invitation to an unscrupulous user to defraud, and may also cause incorrect weights and money values when used by honest merchants for the purpose of balancing their scales,

38 irrespective of the conditions or causes which put said scales out of balance. The device referred to may be used to change the multiple of the long lever, and it is for such reason that I deem it inadvisable to approve a scale that can be so operated at the will of the user. The Standard Computing Scale Company furnished to the purchasers of their scales instructions for the setting up of the scale. In said instructions the user is directed to bring his scale to zero balance by means of the hand-operated screw used to meet the variations caused in the spring by change of temperature. As there are a great many causes other than temperature changes which result in a computing weighing machine getting off zero balance, a manipulation by means of a temperature device would cause the scale to be defective, in that it would not indicate correct weight or money values. It is absolutely necessary that a scale of this type be equipped with a separate zero adjustment independent of the compensating device, so that when the scale is placed upon a merchant's counter and said counter is not perfectly

level, or for reasons other than temperature the scale is off balance at zero, a ready adjustment of the scale can be made at zero without affecting the correctness of the weighing factors of the same. An automatic compensating device is superior to a non-automatic compensating device as it gives greater protection to both the purchasing and merchant public.

13. I deny the allegation in the paragraph of the bill of complaint herein marked "XIV," that the device alleged for correcting inaccuracies is an adequate device for the purpose set forth in
39 said paragraph. The device depends wholly on the constant attention of the owner or merchant or user, in keeping the scale true throughout changes of temperature, and further facilitates fraud on the public in many ways through its single operation, its operation in connection with the other devices, and the failure of the complainant herein to supply devices or access to devices upon the scale needful for its proper and fair operation.

14. I deny the allegations contained in the paragraph of the bill of complaint herein marked "XV." I have not expressed disapproval of ordinary spring scales without automatic compensating thermostatic devices, which expresses only weights and not money values, but I have disapproved of combination spring and lever computing scales, without automatic compensating devices, as lacking in the Twentieth Century Automatic Computing Scales, mentioned in the bill of complaint herein.

15. I deny each and every allegation set forth in the paragraph of the bill of complaint herein marked "XVI."

16. I deny the allegations contained in the paragraph of the bill of complaint herein marked "XVII."

17. I deny each and every allegation contained in the paragraph of the bill of complaint herein marked "XVIII." There are fifteen or twenty computing scales manufactured or sold in New York State but only one other spring and lever scale.

40 18. I admit the allegation contained in the bill of complaint herein marked "XIX," that a scale of the Computing Scale Company of Dayton, Ohio, is equipped with an automatic compensating device to control variations due to atmospheric changes, but I am without knowledge of the truth of the other allegations in said paragraph.

19. I deny the allegations in the paragraph of the bill of complaint herein marked "XX."

20. I specifically admit that I have not expressed formal disapproval of the computing scale manufactured by the Computing Scale Company of Dayton, Ohio, but I specifically deny the allegations as made in the paragraph of the bill of complaint herein marked "XXI."

21. I deny the allegations made in the paragraph of the bill of complaint marked "XXII."

22. I am without knowledge of the truth of the allegations contained in the paragraph of the bill of complaint herein marked "XXIII," that the Computing Scale Company of Dayton, Ohio, is the only serious competitor of the complainant herein, and I

specifically deny each and every other allegation in said paragraph contained.

23. I am without knowledge of the truth of the allegations contained in the paragraph of the bill of complaint herein marked "XXIV."

24. I am without knowledge of the truth of the allegations contained in the paragraph of the bill of complaint herein marked "XXV."

41 25. I am without knowledge of the truth of the allegations contained in the paragraph of the bill of complaint herein marked "XXVI."

26. I deny each and every allegation in the paragraph of the bill of complaint herein marked "XXVII." I have simply instructed the local sealers of weights and measures not to seal combination spring and lever scales, as appears in the rule set forth in the paragraph of the complaint herein marked "VIII."

27. I deny the allegations contained in the paragraph of the bill of complainant herein marked "XXVII" that I have intim-ated or threatened anyone in regard to the complainant's scales, and I am without knowledge of the truth of the other allegations in said paragraph contained.

28. I deny the allegations contained in the paragraph of the bill of complaint herein marked "XXIX."

29. I deny the allegations contained in the paragraph of the bill of complaint herein marked "XXX."

For separate and further defense, I allege:

First. That in exercising the power of supervision over local sealers of weights and measures, granted me under the public laws of New York State, I have not condemned the scale of the complainant herein, but have simply withheld my approval and directed local sealers of weights and measures not to seal the scales of the complainant herein as approved. The powers exercised by the local

42 sealers of weights and measures are in many instances exercised pursuant to local and special statutes and municipal charter provisions, oftentimes much broader and more detailed than the powers conferred upon myself and upon local sealers under the general public law. Accordingly, the Commissioner of Weights and Measures of the City of New York has promulgated a rule identical with that set forth in the paragraph of the bill of complaint herein marked "VIII."

Second. That within the proper exercise of its police powers the State of New York has duly delegated to and imposed upon me the power and duty to supervise the work done by the various city and county sealers. That in the proper carrying out of the said powers and duties I have prepared and promulgated certain general rules and regulations and principles aimed to point out to said officials the elements necessarily entering into proper weights and measures and weighing and measuring devices. I have classified weighing and measuring devices wherever possible by general principles affecting the various classes for the guidance of the city and county sealers. The classification of spring and lever scales is a fair and proper

classification and regulation, and such regulations equally affect the scales manufactured by the complainant and all other scales within such classification. The requirement that all combination spring and lever Computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance, and throughout the whole range of weights gradations, is a fair and reasonable requirement.

Third. The bill of complaint herein should be dismissed upon the ground that:

43 (*a*) Upon the face of the bill of complaint, and upon the face of all of the pleadings herein, there is an insufficiency of fact alleged by the complainant herein to constitute a valid cause of action in equity.

(*b*) There is a non-joinder of parties defendant by reason of failure to include the several city and county sealers of weights and measures in the State of New York and the Attorney General of the State of New York.

Wherefore, the defendant asks that the bill of complaint herein be dismissed, with costs.

JOHN F. FARRELL,
State Superintendent of Weights and Measures.

E. E. WOODBURY,
Attorney General of the State of New York,
Solicitor for the Defendant.

Office and Post Office Address, Capital, Albany, N. Y.

STATE OF NEW YORK,
City and County of Albany, ss:

John F. Farrell, being duly sworn, deposes and says: That he is the State Superintendent of Weights and Measures of the State of New York, and the defendant herein; that he has read the foregoing answer and knows the contents thereof, and the same is true.

JOHN F. FARRELL.

Subscribed and sworn to before me this 8th day of April, 1915.

FREDERICA KNAPP.

Commission expires March 30, 1916.

44 E. 12. 147.

UNITED STATES DISTRICT COURT,
Southern District of New York:

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant.

It is hereby stipulated and agreed by and between the solicitors for the complainant and defendant herein, that the statement of evidence lodged in the office of the clerk of this Court on the 23d. day of May 1917, is a true, complete and properly prepared statement of the evidence taken upon the trial, and it is hereby consented that the same be approved by the court.

Dated, New York, June 8, 1917.

WELLMAN, GOOCH & SMYTH,
Solicitors for Complainant.

M. E. LEWIS,
Solicitor for Defendant.

E. G. G.

45 *Statement of Evidence.*

Complainant's Proofs.

Depositions of Witnesses Taken Before Trial Before Chas J. Herrick, Notary Public, at #452 Broadway, Albany, N. Y., on the 3rd Day of June, 1915.

Appearances:

Wellman, Gooch & Smyth, for Complainant, Frederick W. Bisgood, of Counsel.

Egburt E. Woodbury, Attorney General for the defendant, Edward G. Griffin, of Counsel.

It is hereby stipulated and agreed by and between the Attorneys for the respective parties above named that all objections upon the taking of these Depositions shall be reserved, to be made at the time of the reading of the Depositions in open Court.

DANIEL D. SNELL, sworn as a witness for the complainant.

I reside at 118 Second Avenue, Mechaniesville, N. Y., and am County Sealer for Saratoga County. I have been County Sealer since December 19th, 1910.

I am familiar with the Scale of the Standard Computing Scale Co. known as The Twentieth Century Automatic Scale, insofar as testing it in its money weight, and also of the Avoirdupois weight; I know the scale when I see it.

I have sealed those scales at times. I am not now sealing those scales because of the question of thermostat.

It is conceded by Mr. Griffin that the specification set forth in paragraph No. 8 in The Bill of Complaint herein, was promulgated by the defendant, as State Supt. of Weights and Measures during August, 1914.

The rule just mentioned was brought to me attention in the month of September. I received a letter.

It is admitted by Mr. Griffin that a Bulletin marked "Exhibit A", and introduced in evidence was mailed by Superintendent Farrell to all of the County Sealers and City Sealers in the State of New York.

Before the receipt of that letter I had sealed those scales. I made tests as follows:

I took all the tests from the pounds up to as high as capacity
46 of scales, and then back again to the pound. I received the
weights I tested the scales with from W. & L. E. Gurley; they were tested by State Department Standards and found correct. They had the seal of The State of New York on them, and the date and year in which they were sealed.

I placed those weights on the pan of the scales, and noted the weight as indicated with the different variations in the weights. After making these tests I sealed the scales prior to the notification. Since the notification I have tested them but have not sealed them. The results of the tests were the same as before the notification. My reason for not sealing the scales was information from our Superintendent that they did not comply with the specifications set forth in that rule, that is, that they were not equipped with Automatic Thermostat.

I am familiar with other combined Spring and Lever Computing scales besides the Standard. I am familiar with the Dayton for one. I know of no other Combined Lever Computing Scale. I have spring scales in my County that are not computing that I seal. Such scales are not equipped with Automatic Thermostats. I made the same tests in regard to these other spring scales as I did with the Standard scale. The results, so far as accuracy was concerned, were just about the same.

I have received further instructions and had conversations with State Superintendent in regard to the Standard scale and scales of that class. I think our Superintendent, Mr. Farrell, and I were not alone, but we talked over the question of the thermostat adjustment of scales. This was since the promulgation of this rule.

In my belief our State Superintendent at that time informed me that in condemning the Standard Scale it would be only upon the specifications. He did not instruct me to condemn the scales and I have not condemned them.

Cross-examination.

By Mr. Griffin:

During the four years that I have been Saratoga Sealer, I have had full charge of the enforcement of the Weights and Measures Law in that County. I have corresponded with the State Department of Weights and Measures and met Mr. Farrell several times. We usually conferred about weights and measures matters. I talked with Mr. Farrell for the benefit of his advice and co-operation. I did not go to him for orders. During the time I have been sealer my relations with the State Department were always marked by co-operation.

Neither Doctor Reichman or Mr. Farrell have attempted to dominate me or order me about. They have never made any charges against me for inefficiency.

Since August, 1914, no one has requested me to seal a Standard Computing Scale in my county. The Standard Computing scale is a spring and lever scale. That is something different than an ordinary spring scale, because it has a lever as well as a spring.

47 When I tested the Standard Computing Scale, according to the law, I always took from the smallest weight to the highest capacity of the scale, and then I returned back from the highest to perhaps the centre and then adjusted around that centre, then back to zero. In doing this I simply put the standardized weights on the platform of the scale. That was what I did in this case. I gave this Standard scale the same test that I gave other scales; no less and no more.

I examined the plaintiff's scale in the months of May, June, July, 1914. I cannot remember what sort of a day it was. I do not remember as to the conditions of the weather at that time. I examined this scale on a single day. I did not take it apart. The scale was truly balanced when I examined it, so far as I could determine. I understand you are speaking about the Standard Scale. I think it took me about maybe fifteen or twenty minutes to examine this scale.

I have not condemned any Standard Computing Scales in my experience.

Redirect examination.

By Mr. Bisgood:

I did not go to Mr. Farrell for my orders.

I would not have discontinued sealing these scales had it not been for my attention being called to the specification. I stated to Mr. Griffin that no one had requested me to seal a Standard scale since the promulgation of this rule. Since that time I have visited stores where the Standard scale is in use.

It it my custom to visit stores and seal such scales as I find proper and accurate without being requested to seal them, and if this Standard scale had been equipped with an automatic thermostat I would surely have continued sealing it.

I made the same test in regard to the Dayton scale as I did with this scale. In each case the tests were equally thorough and the result of my test was practically the same. There is a difference in

times and difference in scales, but the Standard being new scales kept up its weighing capacity perfectly, better than old scales.

There were several old Dayton scales in use in my county equipped with automatic thermostats.

Recross-examination.

By Mr. Griffin:

When I find a bad scale I first give the merchant notification of the conditions in which I find the scale, and then if he does not comply in remedying the scale I condemn it. It is a part of my duty to prosecute users of bad scales. I have not had to prosecute anyone. I have not prosecuted any users of Standard Computing Scales, nor threatened them with prosecution. I have never condemned any Standard Computing Scales.

48 ROY F. ACKLER, sworn as a witness for the complainant testified as follows:

Direct examination.

By Mr. Bisgood:

I reside at Ilion, N. Y., and am a retail grocer. I am the owner of a Standard Scale known as the Twentieth Century Standard Computing Scale. I have had that scale since the 19th of June, 1914. I purchased this scale from the agent. The price of the scale was to be One hundred and fifty dollars, Fifteen dollars payable on delivery of scale, Ten dollars the first of each month until it was paid for.

I do not know who was the County sealer in my county. Some State or County official visited my place and tested this scale. I think it was a State official, I do not know for sure. I do not know the man's name. He said that the scale had been condemned. He left with me a notice.

Mr. Bisgood: I offer in evidence notice marked "Plaintiff's Exhibit 2."

I have not my notice with me that was left by the official. The notice left with me was similar to that notice, complainant's Exhibit 2. The words "Slow and Faulty" were on. At the time this official left with me this notice similar to Complainant's Exhibit 2, he made tests of the scale. He used pound and higher denominations and fractions of pounds. This scale had never been sealed by any official. I cannot tell the exact date when this Inspector visited my place. It was August, 1914. Since the visit of the Sealer to my place of business, I have used my scale.

I have a Dayton scale in my place of business. I did not purchase the Dayton; it was in the store when I purchased it. The Dayton scale is equipped with an automatic thermostat. The Dayton scale has not been sealed since August, 1914 to my knowledge. I do not know whether it was sealed prior to that time. For my own

satisfaction I have tested both of these scales. So far as I could see they were exactly alike in the weighing.

I use artificial heat in my store in the winter. I keep my store at about 70 degrees Fahrenheit. I started using artificial heat in October.

I regulate my scales sometimes by the use of the screw, that is, the screw which controls the mechanical device designed to care for changes in temperature. I have regulated the Dayton Scale- that I have because they were off from Zero. These Dayton scales were equipped with an automatic thermostat. I do not know the purpose of this automatic thermostat.

The official who condemned my Standard scale, as regards the Dayton scale, did the same as with the Standard. He left with me a similar notice to Complainant's Exhibit #2, affecting the Dayton scale. The same notice covered both scales. I do not remember the words "Standard" written in lead pencil above the printed words "Computing Scales" on Complainants' Exhibit #2.

Since that notice was left with me I have not continued
49 payments upon my scale.

The letter you show me is mine to the Scale Company.

Letter received in evidence marked "Complainant's Exhibit #3."

Those pencil notations and the stamp were not on there when I sent the letter.

Cross-examination.

By Mr. Griffin:

Since I have been able to work I have been office boy, Remington Arms Co., Assembled Guns in the Remington Plant, Assembled Guns in Winchester Repeating Arms Co., finished typewriters, assembling for the Remington Typewriter Co. of Ilion, have assembled rear axles of automobiles for the Weston-Mott Co., of Flint, Mich., and been a grocery clerk. I was a grocery clerk first in 1904 for Alfred Gray of Ilion. I was there three weeks. Before I opened the grocery store in Ilion, I finished assembling typewriters. I bought a store out from Shufelt & Mack. I found the Dayton scale there.

I bought the Standard Scale because I needed another scale to shorten my labor; my Dayton scale was situated in the rear of the store and I wished a scale nearer the front. The Dayton scale was satisfactory to me. I did not buy a Standard Scale in preference to another Dayton scale. The Standard scale had no peculiar advantage to my mind to induce *he* to buy it; the agent happened along and it looked satisfactory.

I don't know much about comparative merits of scales. I regard myself as a skilled mechanic in the lines which I follow. Gun and typewriter work are comparatively high grade mechanical work. I believe my Dayton scale was tested by some sort of an official about January or February, 1915.

The person who tested my Dayton scale made no comments about

it. He left a slip with me concerning it. The slip described the Dayton scale as correct. The Standard scale was described slow and faulty. He tested both scales the same way, to the best of my knowledge. I observed him test them. I said on my direct examination that one scale was as accurate as the other, to the best of my knowledge. I tested them together.

I have weighed various articles on one scale and then on the other, and as far as I could tell they were similar. I could not state the exact number of times I did this, perhaps fifty times. I began testing the scales in this way after the inspector had been there.

When the Standard scale was delivered I was instructed how to operate it by the gentleman who delivered the scales, and later received a communication from the Standard Computing Scale Company. I haven't that communication with me.

It took the inspector, I should say, half an hour to examine my two scales. I would say that he spent twenty minutes on the Standard and ten on the Dayton. I had not to my knowledge
50 manipulated the Standard scales the day he was there. I had at times set it to zero, about four or five times previously, between the early Fall and Winter. I had never taken it apart. There is a screw about one-third of the way up the post on my scale. I knew how to use that screw; I had been instructed. I never used it; I was instructed to use that to govern the speed of the roll. The screw down on my scale near the platform is the one I have reference to. There is one screw near the platform, I should judge about one-third of the way up. There is a screw on the post, and one lower down on the platform underneath. I was instructed how to manipulate both screws. I never have manipulated the screw on the post. I have manipulated the one underneath the platform four or five times.

Q. I call your attention to page #3 of your deposition, the question was "By the same do you mean that he left with you a notice similar to Complainant's Exhibit #2, effecting the Dayton Scale?" and then your answer "the same notice covered both scales." Do you mean that both scales were condemned?

A. No sir, I mean that the notice or the slip that he handed me covered his report on both scales. The slip said that the Standard scale was slow and faulty.

At different times I have adjusted the Dayton scale. The scale was satisfactory to the inspector at that time. I knew the scale was off because the line corresponding with zero did not match with the line on glass. I don't remember whether I adjusted it before the official came or not, he marked it correct. The Standard scale was marked slow and faulty by the inspector.

Redirect examination.

By Mr. Bisgood:

When I spoke of manipulating the scale, I meant adjusting the scale. I did not mean that I arranged the scale so that the weights indicated would be incorrect. I meant that I adjusted the zero mark to be in line with the straight mark on scale.

JOHN W. PRESCOTT, sworn as a witness for the complainant, testifies as follows:

Direct examination.

By Mr. Bisgood:

I reside at Ilon, N. Y., and am proprietor of a meat market. I use Standard Computing Scales in my meat market, just the one scale. I think that is the scale known as the Twentieth Century Automatic Computing Scale. I have used such scales six months, I think, I am not positive, to the best of my knowledge. Such scales were satisfactory to me. I have been in the business in which I am now engaged twenty years, and during that time I have used a number of different kinds of scales. This Standard Automatic Scale is as good as any of the scales I have used; they all need adjusting at times.

My scale has a thermostat under the platform to regulate
51 it. The real definition of a thermostat I do not know, more than to regulate the scales to the weather and have it correct on weighing. My device is not automatic.

I have not been visited by the County sealer since I have had the Standard scale. When the last inspector came around I came in as he was about to leave the place. He said the scales were faulty, slow and I asked him to explain. I may not be clear on all of this, but this is as near as I can remember all he said. I think he said that they were not up to the specifications, as I understood him, or words to that effect. In regards to the thermostat arrangements in adjusting the scales, I asked him if I could use them or keep on using them and I think he did not say that I could use them or could not use them. I think that was the State Inspector. He left a slip with me similar to Complainant's Exhibit #2. I haven't that slip with me.

I use my device for adjusting the scale to care for temperature changes. I watch all scales all of the time to see that they are at zero balance. I do most of the weighing myself. Before weighing commodities upon my scales, with respect to arranging these scales, if the scale is correct, I proceed to weigh, if not I fix it. That is my custom always.

Cross-examination.

By Mr. Griffin:

I do not know who this inspector was. I cannot swear who he was. I think he was a State Inspector. Just a minute ago I swore I did not know whether he told me I must not use the Standard scale or not. He did not say I should or should not use it. I am sure that he left a slip with me. This slip said slow and faulty. I do not know whether those particular scales were marked slow and faulty or not.

I have no other scales. I am prepared to swear that I was advised by the Inspector that the Standard Computing scale in my possession was slow and faulty. I am sure of that from what he marked on the slip. As I said before, I do not know that the Standard scale was

marked slow and faulty. There is nothing about this transaction that I am very sure of.

I was instructed how to adjust the Standard scale when I bought it. I cannot say that this was one of their latest scales. In adjusting this scale there are, I think, three screws on it. Under the drum there is a set screw, and also down at the bottom of the column. The third one is right under the platform. I was not instructed how to use the screw under the drum or the one in the column. I was instructed how to use the one under the platform. I occasionally adjusted the screw under the drum. Before the inspector came I adjusted the one under the drum to get it to zero. I would nver touch the screw in the column. I only adjusted two screws on the scales, the one under the platform and the one under the drum, and when by adjusting both screws I got the scale to zero I was satisfied that my Standard scale was correct. The inspector said the scales were slow and faulty.

Redirect examination.

By Mr. Bisgood:

In answer to Mr. Griffin's question, I stated that the only thing that I was sure about in this whole transaction was that some-
52 body gave me a slip saying that the scale was slow and faulty. That person signed his name in the space above the printed words "Inspector of Weights and Measures" on Complainant's Exhibit 2, to the best of my judgment. I did not see the Inspector test the scale at all.

Recross-examination.

By Mr. Griffin:

I am not a skilled mechanic. These adjustments that I made were easily and promptly made. I did not have to take the scale apart to make them. To make the adjustment under the platform I used a little small screw driver. To make the adjustment under the drum I used the same thing. One was practically as easy as the other. My scales could be thrown out of adjustment. In the first place it is supposed to set level, it has set screws for that purpose I think, I am not sure. The only other way is by the heat or cold weather, or elements.

Recross-examination.

By Mr. Bisgood:

There is no other way that I know of that these scales can get out of condition, that I now know of.

MICHAEL J. SHELLY, sworn as a witness in behalf of the complainant testified as follows:

Direct examination.

By Mr. Bisgood:

I reside at 22 Reed St., Amsterdam, N. Y., and am engaged in the grocery and meat business. I use Standard Computing Scales in my business. I have been using the Standard Computing scales two or three years. Those scales have been sealed. They were sealed last summer, two or three times since we have had them, by Mr. Connell.

Mr. Connell visited me the last time some time last Fall. He sealed my scales then. Shortly after the time he sealed them, he came again, told us we were not to use them any more. He put a red card on the scale. I do not remember that he tested the scales at that time. I do not remember exactly the reason he gave for not sealing the scales; he said they were condemned and the State Law would not allow them or something to that effect.

I have used that scale since. I do not remember that Mr. Connell said anything would happen if I continued using the scale; he however instructed me not to use them.

I have also a Dayton scale. I think we have owned that Dayton scale the last seven or eight years, possibly more than that. The sealer sealed that scale. I have tested these scales myself a great many times. We used to test these scales with hams, meat and pieces of pork and about everything in meat line to see if they would correspond. The result of my test was that I found them both the same.

Cross-examination.

By Mr. Griffin:

The reason why I tested my scales so carefully was that I wanted to see whether there was anything wrong with the scales.

53 I do care about the law. I know there are laws under which merchants will be prosecuted if they use bad scales.

One of my objects in testing the scales was to avoid being prosecuted when the scales were examined and sealed. The sealer did not give me a slip at the time he examined my scale, that I know of. He did not give me a slip the second time. I do not know that he put a tag on my scale the second time he came. The only one that I know of is the one that he put on first. He put it on when he came the second time. I believe the tax is there now, but I've been using the scale right along. I have been afraid of being prosecuted. Between that time he stopped me from using it and the time the Computing Companies came around and told me what action they had taken, I was afraid.

I don't exactly remember what time they came around. I have not had to adjust my scale since I had it. I have never done anything with it, I have never seen there was anything to it.

I could not exactly tell whether the temperature is always the same in my store approximately. It is a good deal warmer in my store in the summer than it is in the winter. I have never noticed that changes of temperature have any effect upon my scale.

I have never touched my scale for adjustment in three years. At the time it was put there they showed me how it was adjusted, and I have not done anything with it, only what the sealer had done; he adjusted it from time to time. I believe there are three screws for adjustment on my scale; one under the drum, one under the glass plate and one in the column. The one under the drum is covered up by a little cap, if I remember right. I am not sure that there is not an adjustment over at the side of the drum.

Redirect examination.

By Mr. Bisgood:

I said that one of my objects in testing the scales was to avoid prosecution, that is what I told Mr. Griffin; another one of my objects was a desire to give honest weight. I did not want to defraud my customers. Even though there was no law forbidding my using an inaccurate scale, I would still be anxious to give correct weights.

I stated to Mr. Griffin that my store was warmer in the summer than in winter. We have a stove in the rear of the store in the winter. I do not go about in my store with my overcoat on. It is not uncomfortably cold here, when we have the stove. I keep meat in my store, and we keep the temperature low enough that the meat will not spoil in the ice box. The other part of my store is quite warm in summer.

JASON E. DAVIS, sworn as a witness on behalf of the complainant, testified as follows:

Direct examination.

By Mr. Bisgood:

I am in the grocery business, at 134 Florida Ave., Amster-
54 dam, N. Y.

I have a Standard scale in my store. Mr. O'Connell, Sealer of Montgomery County, called at my store. He tested my scales and found them correct, but would not seal them on account of not complying with the State specifications. He left a slip with me. I have had that scale approximately ten months. It has never been sealed. I cannot remember the date of the first time that the County Sealer ever called at my place.

It was in August if any time, shortly after I purchased them. I have other makes of scales in my business. I have a platform scale, what make of scale it is I cannot tell you.

Cross-examination.

By Mr. Griffin:

On this slip by the County Sealer was written, as near as I can remember, "if one does not comply with State specification." He did not seize my scale and report me to the police. I have never been threatened with prosecution.

I have not paid for this scale fully. I have not been making payments since the sealer was there the first time. I have never been dunned for the money, nor pressed in any way, that I recall.

A sealer has been around once since the first time. I cannot say definitely when that was, about in December. That was McConnell, the same man. This time he tested the scale same as he had done previously. He said they were still working all right. He handed me a slip. I have not the slip with me.

I am using the scale up to the present time unmolested and without fear. I was taught how to adjust the Standard Scale. It is necessary to use in the adjustment of the scale, to make it accurate, three screws. The first screw is under the plate beneath the roll; the second screw is at the bottom of the column under the glass; the third screw is under the platform. I have adjusted my Standard scales from time to time, approximately three times during December and January. That might have been twice in one month. I believe I adjusted it three times in all during the months of January and December. The screw under the barrel adjusts the weighing part of the scale to the zero mark; the screw on the column adjusts the speed of the scale; the screw under the scale adjusts according to the temperature of the room. I learned all of this from Mr. Hawkins, representative of the Standard Computing Scale Company. I was told to use a screw driver.

I do not remember what I was told to use for the three screws. I have a book of instructions. I could not recollect what I used for the other two screws unless I had a book of instructions, but the book of instructions does tell me.

Redirect examination.

By Mr. Bisgood:

I touched two of these screws, the one in the so-called thermostat, and the one under the glass to regulate the vibration of the
55 scale. I never touched the screw under the barrel.

GEORGE B. MAY, being sworn as a witness for the complainant, testified as follows:

Direct examination.

By Mr. Bisgood:

I reside at Middleville and am a butcher. I have been in that business twenty years. I use at present Standard Computing Scales, in my business, entirely. I have one of those scales in my store. I cannot tell how long I have had that scale, approximately since June, July or August, 1914.

Since I have had that scale the County Sealer has visited my place of business and has sealed my scale. I recognize the paper handed to me. I first saw that paper on May 25th, 1915.

Mr. Bisgood: I offer it in evidence.
Received and marked "Complainant's Exhibit No. 4."

The pencil notation upon Complainant's Exhibit No. 4 was there at the time I received the paper. When I received Complainant's Exhibit No. 4, the person delivering it to me did not seal my scale. He removed the seal that he placed there before.

I recognize Complainant's Exhibit No. 2. I first saw that on January 29th, 1915. Mr. Dasney made it out and handed it to me. Mr. Dasney came into my place and he said he was Mr. Dasney of the State Department of Weights and Measures. When he came in and told me he was from the State Department of Weights and Measures, I told him to go ahead and he says, "I see you have the Standard Scale," and I said "Yes," and he says "Do you know they are not accepted by the State Department," and I said "No," and said "For what reason?" and he said "On account of the Thermostatic device," and I says to him, "Test the scales," and he tested them and could not find any fault with them any more than that they was giving on his first test a trifle over a half an ounce too much on the pound, and I says to him, "That is not a very bad test on a scale," and he says "No, but they are slow and faulty." I says to him, "How are they slow and faulty when they actually give more than weight." Then he tells me that I cannot use them and I called his attention to the fact that the Sealer of Weights and Measures has already sealed the scales, and I asked him if I continued using the scales what would be done about it, and he said perhaps I'd lay myself liable to a suit. And then I asked him what scale he would recommend and why, he says "It is not up to the Sealer of Weights and Measures to recommend any scale." "But," he says, "What was the matter with the scale that you had?" and I told him there was not anything only it had got dirty, the enamel was off and that it did not look very good. And I says to him from that probably that a Dayton scale would be acceptable to the State Department and he said the Dayton scales were all right.

56 He made further tests besides the first test with the one-pound weight. He tested I think the three pounds. The result of that test was that they run about a half an once over weight all the way through, but I explained to him that I used a paper on the scales when weighing.

I recognize that letter dated January 29, 1915.

Mr. Bisgood: I offer it in evidence.
Complainant's Exhibit No. 5 received.

I wrote that letter immediately after Mr. Dasney was in my place to the Standard Computing Scale Company. The pencil notations below my signature and file mark at the head of the letter were not on at the time I mailed the letter.

Since I sent that letter I have not made any payments to the Scale Company. The terms of my agreement were $7.50 monthly. Before writing this letter I had paid to the Scale Company monthly installments according to the terms of the contract.

The old scale that Mr. Dasney referred to was a Dayton. That old Dayton scale was equipped with an automatic compensating device.

Cross-examination.

By Mr. Griffin:

I am still using my Standard scale. I have used it all the time since I had it. The Standard Company has dunned me for the money I owe them. I think I have had one or two letters from them calling my attention to conditions of the contract. I could not tell now when I received that last letter. I think it was in January. I have no understanding with them whatever, that they will not insist upon payment until this law suit is decided any more than a circular letter saying they had a suit pending in New York State. I don't understand that I am not to be bothered for money. I am not confident that I won't be bothered for this account.

No public officer has threatened me for using the Standard Scale, any more than what Mr. Dasney said, on January 20th, 1915, he said I might have a suit and I told him that the scales was already sealed by a County Sealer.

I cannot tell here how much I paid on the scales altogether. To the best of my knowledge it was $90.00. The result of this whole proceeding is that since January 29th I have had the use of a Standard Scale for $90.00 unhindered by anybody.

I was instructed how to adjust the Standard Scale. I was shown how to adjust three screws, one for balance located under the drum, one on the column for oscillation, the third one for temperature under the platform. I have never made an adjustment of the scale. Mr. Gaffey sealed the scale in November.

I tested my scale twice a week by the weights from the platform scale which weighed one and three pounds. They are counterpoise weights. I get my Standard scale to zero. I am not satisfied that they are correct.

57 I allow something for the paper I put on the scales. By the meaning of a slow scale I understand a scale that weighs under that test.

I understand by the report of Inspector Dasney that he meant my scale favored me and injured the public; that is what the report said, but I dispute the report of Inspector Dasney.

I keep the temperature above freezing in my meat room where I sell my meat. In the months of August and September the temperature there was higher than it was this January. Speaking generally, the temperature change in the hot months from the cold months is about thirty degrees. During the time I have owned my Standard scale I mean that sometime the temperature has varied as much as thirty degrees.

I bought my scale in June or July, and have been using it to this date, and during the time from June to May the temperature has changed as much as thirty degrees in the meatshop where the scale is, between July and the last of October. I should not think there

was a change of over fifteen degrees in temperature; towards the last of October the room where the scale is became 15 degrees colder between the early summer and the fall. That change of 15 degrees had no apparent effect upon the accuracy of the scale. The room got fifteen degrees colder than it had been the last of October in the months of December and January, or perhaps in February, so sometime during December and January and February it is my best recollection that the room got thirty degrees colder than it was in the summer.

My Standard scales were first sealed in November by Mr. Gaffey, County Sealer of Weights and Measures. The temperature of the room at that time, as compared with when I first bought the scale was about fifteen degrees different. Mr. Gaffey had to adjust the scale. It was less than an ounce off. The next time it was examined by an official, which was January 29th, 1915. The temperature of the room on January 29th as compared with when Mr. Gaffey sealed the scale was colder.

I dispute the correctness of the report which was made on my scale when examined January 29th. I dispute the part of it being slow. On January 29th the room was about as cold as it ever is, to the best of my recollection. On May 25th when the scale was examined, it was tested for accuracy with a ten pound weight; it was found that I was getting about a half an ounce the worst of it.

I would say the temperature in the room on May 25th was around sixty degrees. After Mr. Gaffey adjusted my scale in November, I did not adjust it any between that time and January 29th. I never touched it. I did not adjust the scale between January 29th and May 25th, 1915. So the scale on May 25th was still giving me a half ounce the worst of it on a ten pound weighing.

Redirect examination.

By Mr. Bisgood:

These weights that I tested my scale with myself had never been tested any more than I tested them myself. I tested them
58 myself on the scale immediately after the scale had been sealed.

HENRY GAFFEY, sworn as a witness on behalf of the complainant, testified as follows:

Direct examination.

By Mr. Bisgood:

I reside at New Port, N. Y. I am county sealer of Herkimer County. I am not familiar with the Twentieth Century Standard Computing Scale as an expert. I know the scale when I see it. I have been County Sealer since April 18th, 1911. I have sealed one Standard Computing Scale. I could not just say how many Standard Computing Scales I have seen in my district. I have seen more than that one, but I could not say whether two, four or six. I did

not seal that one scale, prior to August, 1914. I have never received any instructions from the state Supt. of Weights and Measures relative to these scales. I can't say that I did receive one of those (examining Complainant's Exhibit 1). I got a bulletin but I cannot say I ever saw this particular one. I see Complainant's Exhibit No. 4, that is my signature at the bottom. That is my writing on the slip. I wrote all of the script upon Complainant's Exhibit 4 except exhibit mark. I wrote "scale weighs correct, but does not comply with N. Y. State Specifications," upon the slip. By N. Y. State Specifications as written there I refer to the adjusting device under the platform, because it does not work automatically. Mr. Dasney informed me of this specification. I asked first about it. Mr. Dasney is one of the Deputies in the State Department. I sealed this scale prior to the time that I asked Mr. Dasney. I happened to speak to Mr. Dasney about this. One morning I was going to Herkimer and Mr. May got on the train at Middleville and during our conversation told me that the State Inspector had been there and questioned the use of the scale. So of course I wanted to know why he had done this, so the next time I saw Mr. Dasney I asked him if he had been to Mr. May's place and he told me he had and called my attention to this adjusting device. Mr. Dasney said that the scale, or
59 any scale rather, should have an automatic device and that this device was not automatic. I visited Mr. May's place after that. Mr. May's scale was the one that I had sealed. When I went to Mr. May's place after this conversation with Mr. Dasney I did not seal his scale.

At the time I sealed Mr. May's scale I tested it with weights running from a quarter of a pound, I think to its capacity. I do not remember what its capacity is and then I sealed the scale. The weights that I tested the scale with were supplied by the County of Herkimer and have been sealed by the State Department. It is not my custom to seal inaccurate scales. After this conversation with Mr. Dasney, I again tested Mr. May's scale and then left him this slip (Complainant's Exhibit No. 4) stating that the scale was correct, that it weighed correct. The statement on this slip is true. I am familiar with other types of spring and lever computing scales than the Standard, the Toledo, Anderson and Dayton. I seal the Anderson Scale if they weigh correct. I think I have more Toledo Computers than any other kind in my County. I am continuing to seal the Toledo if they weigh correct. I could not say whether the Toledo is equipped with an Automatic Thermostat. I don't know that the Toledo scale is a spring scale. I never took one apart to really know. The Toledo scale complies with the New York State specifications for anything I know. I could not say how long since I have sealed the Toledo scale, I might have sealed one yesterday. I generally examine the scales to see if they comply with the New York State specifications, I think I have. I know that the Standard Scale does not comply with the New York specifications because I was told by all from whom I made inquiries, the same thing about adjusting device and plainly saw that it was not automatic. I asked Mr. Dasney, he is the first man. I was in Albany at the time and

there was several of the scalers here. I could not say just who I asked, several other scalers. I never took the Standard Scale
60 apart to see if it was a spring scale. The only reason I have neglected to seal the scale is because I have been told by the State Inspectors that such scale was improper, of course they were not all State Inspectors who told me that. My duties, the duties I am charged with must be performed by me. If you should tell me that the Standard Scale was an improper scale, I would not for that reason condemn it, I would kind of look it up a little, if a State Inspector told me that such scale had been condemned by the State Department, I would not feel justified in refusing to seal it, a lot would depend upon my own judgment. In the case of Mr. May's scale I exercised my own judgment as follows:

I went in Mr. May's market, I had some small weights, etc., and a ten pound weight, and Mr. May told me he had not touched the scale since I had been there before; that is to adjust it and at that time we had set the device at 45 degrees, that was in November, and though I do not remember that he had a thermometer in the market, that was approximately the temperature there, so the first thing I did was to place the ten pound weight on the scale and the scale weighed this ten pound weight as nine pounds and either fifteen or fifteen and half ounces, I won't be sure which it was. And as the temperature at that time, we estimated to be sixty degrees, we changed the device to sixty degrees and gave the scale a test up to fifteen pounds, possibly fifteen and a half or three-quarters, and it showed the weight correctly, and this proved to me that this device had to be changed to compare with the temperature in order for the scale to weigh correctly. And then I did not seal the scale but I certified that the scale weighed correctly. I did that because on a balance ball specification I had condemned a number of scales, probably a hundred. A lot of them being in cheese factories or milk stations where they had to use a scale every day and did not have another scale to replace it, so while I had condemned the scale if it weighed correctly, I had so stated on the slip I made out. I
61 did this because it took some little time to get a new balance ball and on some types the bar had to be taken to a machine shop or returned to the factory or repair shop where this new style of balance ball could be put on. My reason for doing that was that if anyone questioned the owner as to why the scale had not been sealed by me he could show them this slip so that while he was arranging to have this balance ball put on they would be satisfied with the weights that they were getting. And in this case I did this for the same reason. While I did not tell Mr. May he had got to get a new device, I told him that no doubt the company would remedy the matter.

Cross-examination.

By Mr. Griffin:

I do not consider myself a scale expert. I am a practical scale man. I never do any repairing. I help out on adjusting some-

times. I cannot say that I have had the different kinds of scales apart. I cannot go into the physical type of each scale. When I was talking about the Anderson scale and Toledo scale, I simply meant that they had a computing barrel. I am not certain whether the Anderson scale and Toledo scale are gravity scales or spring and lever scales. As a practical man I avail myself of the best information possible in my field of work. I consult with other sealers whenever I see them, Mr. Dasney in Herkimer I see him more often than any other. I talk these matters over with practical scale men at times, I run into scale agents. I talk with some merchants and the general public. I talk with Superintendent Farrell. I never had the pleasure of meeting the man very much. I have written once or twice and corresponded with him. The Superintendent of Weights and Measures is only one of a number of people I consult concerning my work. I do not consider myself an employe of Superintendent Farrell or subject to his orders, subject to his advice perhaps, he has never given me any orders to my knowledge. If he put out a specification that I believed was absolutely wrong I would consult with other sealers to know what they were going to
62 do before I did anything. I felt that since I am a practical man, rather than an expert that I did not want to take upon myself the refusal to seal a scale until I could get the judgment of other persons upon whom I could rely. When I refused to seal the Standard Computing Scale in my County I was acting upon my own judgment, formed after consultation with various persons including the Superintendent of Weights and Measures. When I tested Mr. May's scale you guessed at the temperature. If I were wrong I might have set the scale off as far as I know. The Standard scale is not a difficult scale to set correctly. I cannot say I found it so difficult to set. I will say that it is difficult, it has to be looked after.

Redirect examination.

By Mr. Bisgood:

I had little experience with this scale, this Standard scale. The thing that put me against it was that Mr. May had not touched it since before I was there and there was easily a difference of fifteen degrees in the temperature from the first time I saw it until the second. I told Mr. Griffin that I consulted with the merchants and general public about scales but not about this particular scale. I cannot say that I would have refused to seal this scale if I had had no word from any State official.

CHRIS HAYL, being duly sworn on behalf of the complainant, testified as follows:

Direct examination.

By Mr. Bisgood:

I am a grocery man and own a Twentieth Century Standard Scale. I know Mr. A. J. Ree-. Mr. Reed is the Sealer of Weights and

Measures in our City. Mr. Reed visits my place about every six months.

My Twentieth Century Scale has been sealed. I have seen that slip you show me before that slip was presented by Mr. Reed.

Slip received in evidence as Complainant's Exhibit No. 7.

63 At the time Mr. Reed gave me this slip he sealed the scales. Mr. Reed gave me that other slip you show me.

Slip received in evidence, marked "Exhibit 8."

At the time Mr. Reed handed me Complainant's Exhibit No. 8 the seal was on when he tested it and he left the seal on. That slip you now show me was handed me by my clerk who stated that Mr. Reed had taken the seal off and placed it on the floor leaving this slip.

Slip received in evidence marked "Exhibit 9."

The seal was not on the scale when I came back. All the pencil notations were on the slip when I got it. My clerk handed it to me and told me what Mr. Reed said. I have other scales in my store. I have no other computing scales. I have used other computing scales. I had *not* other computing scales in my possession when any of these slips were given to me. I have not had any other computing scales, but I have worked on other computing scales.

Cross-examination.

By Mr. Griffin:

I have never been prosecuted for using the Standard Computing Scales. No one had ever threatened me. The first one of those slips is dated December 18th, 1913, second dated May 20th 1914, last one dated April 16th, 1915. I have been using my scales right along from April 16th, 1915. I did not understand it that Mr. Reed had condemned the scale when he took the seal off. I understood that I could go on using them. I understand how to adjust the Standard Computing Scale. I learned putting a Dayton scale together, these scales are very similar. I have received instructions from someone representing the Standard Scales. I did not learn adjustment of Standard scale from putting up a Dayton. I learned to adjust a Standard scale from the man that delivered the scale, representing the Standard Company. There are three points of adjustment on the Standard Computing scale. I have not used any of them, I have never adjusted my scale.

Redirect examination.

By Mr. Bisgood:

64 My contract with the Standard Company was an installment contract. I have not paid all the installments that were due. As soon as I thought that I could not use the scales, I

stopped paying installments. That is after I had received Complainant's Exhibit No. 9.

WILLIAM LIPPMANN, sworn as a witness for the complainant, testified as follows:

I reside at City Hall, Troy, N. Y. That is my office. I am the weight and Measure Official for the City of Troy. I am also a Merchant Tailor. I have been city sealer of Troy July 1st will be three years and a half. There are in my City to my knowledge Computing Scales manufactured by Standard Computing Scale Company. I am unable to tell you whether they are combined spring and lever. There must be between four and five such scales in the City of Troy.

It is admitted on the record that a Bulletin similar to Complainant's Exhibit No. 1 was mailed by Superintendent Farrell to all of the County Sealers and City Sealers in the State of New York.

I have a bulletin in my possession. I do not know when I received such bulletin. It might have been within a month. I could not tell you if it was within ten months. I am familiar with the regulation on page 8 with reference to Automatic Computing Scales. My instructions in reference to the Dayton and the Toledo was that I can seal at any and all times if I find them correct in reference to computing and that they at all times regulate themselves to the change of atmosphere. The instructions in reference to the Standard Scales I received *such* that they do not automatically regulate themselves with the change *if* the atmosphere and therefore cannot seal. I obeyed those instructions. Those instructions came from State Inspector by name Mr. Knazer. I never sealed a Standard Computing Scale, nor did I condemn it. I might have visited stores
where the Standard Computing Scale was used before I re-
65 ceived this Bulletin from Mr. Farrell. I cannot remember
but when I did visit such store it was in the company with the State Inspector. I would not test the Standard scale since I received this Bulletin.

The State Inspector told me that the Standard scale does not comply with the specification, to which I have satisfied myself to, therefore I would not seal it or test it because I thought it was only a loss of time. The instructions made me form that conclusion. I do not understand anything about mechanics, nor will I undertake to argue any mechanical question. The State Department has more knowledge of the instrument than I have, consequently I take their advice. I could form no conclusion from my knowledge of the scale outside of instructions or advice which I received from the State Department, as to the accuracy of the scale, for the simple reason I have never examined the scale and was disinterested in its construction.

I seal the Dayton scale at the present time. I am sealing other spring scales that are not computing scales, and which are not equipped with an automatic thermostat, butcher markets have spring scales, grocers have spring scales, and none are equipped with that. I am sealing them, sure, I seal them; they do not have to be

equipped with that. I do not know whether or not the computing device on the Standard Scale affects the scale itself. How could I know when I never took an examination of it.

Cross-examination.

By Mr. Griffin:

I attended a demonstration of scales at the Superintendent of Weights and Measures office. I am not an employee of Mr. Farrell. I am not one of his subordinates, I am a subordinate of the City of Troy. Merely come under his supervision. The fact that I live so near Albany doesn't bring me in contact with Mr. Farrell often. I see him sometimes at demonstrations at Albany. Whenever we meet I do not talk over weights and measures matters. I do
66 not always rely on Mr. Farrell's advice sometimes I disagree with him. I do not always follow his advice.

Depositions of Witnesses Before Chas. J. Herrick, Notary Public, at #452 Broadway, Albany, N. Y., on the 4th Day of June, 1915 (*Continued*).

Frederick W. Bisgood, for Complainant.
Edward C. Griffin, for the Defendant.

JOHN J. MANN, sworn as a witness for the complainant, testified as follows:

Direct examination.

By Mr. Bisgood:

I reside at Guilderland Centre, Albany County, and am County Superintendent of Weights and Measures of Albany County. I have been sealer of Albany County about ten years. I have had no experience with scales outside of the experience I have had as county sealer. I have a knowledge of the various types of spring computing scales that are used in my county. I am familiar with the regulation of the State Department concerning a certain thermostatic device that is set forth in Complainant's Exhibit #1 which you show me. That ruling was first brought to my attention, I should say right after they were issued. Before the issuance of that regulation and before that regulation was brought to my attention I had as county sealer, visited stores in which the Standard Computing Scale was used and examined and tested such scales. Before this ruling when I made such tests, after the completion of the test I sealed the scale. It is my custom in making my tests to seal such scales as I find accurate and comply with the State specifications, such scales as do not comply with the State specifications I neglect to seal. Since the regulation set forth in Complainant's Exhibit #1 was brought to my attention, I have sealed a Standard Computing Scale. The scale was not set up right, at my first visit I told the proprietor of the place to either get it in shape and work like the other one did, I would seal

67 it, and I did. There was one scale, which I sealed prior to the ruling of the State Superintendent and one scale which I sealed after the ruling of the State Superintendent, and this was not the same scale. I have visited the merchant whose scale I tested and sealed before this ruling, since August, 1914. I tested the Standard Computing Scale in his place since August 1914. I did not at such time seal his scale. I visit the various stores in my county for the purpose of making tests of scales not less than twice in each year. My last tour was last Tuesday. I did not visit any stores having Standard Computing Scales at that time. I have tested two Standard Computing Scales since August, 1914. One I sealed, and the other I did not seal. I am familiar with the Dayton Automatic Computing Scale. I have tested and sealed some of such scales.

When I examine scales of any kind I start with a small weight, test it up to the full test, as a rule, and then reverse back. That is I take the weight and place it on the pan of the scale and note the weight that the scale indicates. I get the weights which I use from X. & L. E. Gurley, Troy, N. Y. There are marks on those weights. It is an Eagle and the date and "N. Y." I know what that stamp represents from the certificate I got from Weights and Measures Department accompanying those weights, that stamp represents the official seal of the Weights and Measures Department of the State of New York. I presume I am a practical scale man. I do not consider myself competent to assemble and take down scales and to compute the accuracy of the scale in any way except by practical tests, that is not all scales. I do not consider myself competent to determine the accuracy of scales of the type of the Standard Computing Scale, other than by practical tests but I know that if I put a ten pound weight on the pan of the scale and the scale reads eight pounds the scale is not accurate.

Cross-examination.

By Mr. Griffin:

So far as I know there are two Standard Computing Scales in this County at this time, two or more. I have been told of more
68 than two. I have seen a third one in my section. I don't know if I have ever seen or examined it. The two scales I was talking about on direct examination were sealed by me at different times. I apply the same tests in examining Standard Computing Scales as I apply to other scales of the computing type. I simply put Standardized weights on the platform and see if the scale accurately records their weight. I attended the conference of the sealers of weights and measures held for this State a year ago. I did participate in and hear discussion concerning computing scales. I think I gathered some of my ideas as to the comparative merits of computing scales from such conference. This conference was held in May or June, 1914, at Watertown.

I am not a subordinate or an employee of the State Superintendent of Weights and Measures. I consider myself free to reject his directions or advice if I do not approve.

Redirect examination.

By Mr. Bisgood:

I say that I feel myself free to disregard the State Superintendent's instructions, if I do not agree with them. In answer to your question before I stated that I sealed such scales as I found accurate and complied with the State specifications. The State specifications have been followed by me in my official work, practically followed. I consider myself free to disregard those instructions, so far I have regarded and disregarded them.

HARRISON F. FINKLE, being sworn as a witness for the complainant, testified as follows:

Direct examination.

By Mr. Bisgood:

I reside at 46 Willis St., Troy, N. Y. My business is Meats and groceries. I have a retail store. I have a Standard scale which I use in my business, that is the Twentieth Century Standard Computing Scale. The City Sealer of Weights and Measures is William Lippman.

I have been in my present business, it will be three years the 1st of October. I have not during all that time had my Standard
69 Computing Scale. Mr. Lippman has not visited my place of business since I have been there. No state inspector has ever visited my place of business. I have had a conversation with Mr. Lippman relative to my Standard Computing Scale. On the start off I got it from the Toledo man saying that the sealer would not seal them. I called Mr. Lippmann at the City Hall and asked if he would seal the Standard Scale and he answered "No" for the reason it would not automatically adjust itself with the change of the temperature. I then sent notice to the Scale Company telling them of the fact.

That is the letter that I sent to the Scale Company. Letter received in evidence marked "Complainant's Exhibit 10."

The stamp mark was not there at the time I sent it. The pencil marks were not there, just pen and ink. The rest of the writing is all mine.

Cross-examination.

By Mr. Griffin:

In the letter just offered in evidence I said that the sealer had been to my store, he had not been to my store. I called him by telephone. I have a balance scale in my store besides the Standard. I have measuring devices in my store. Mr. Lippman has never sealed any of those. As a matter of fact during my experience in the business he has never been near my place.

I am using a Standard scale at the present time. I have never

been threatened with prosecution for using it nor has anyone ever interfered with my using it.

I know how to adjust the Standard scale. There is only one point of adjustment on the scale to my knowledge.

Redirect examination.

By Mr. Bisgood:

The adjustment that I know of is the thermometer under the plate or pan. I received a reply to that letter (Ex 10). Between the time that I sent this letter and the receipt of the reply, I used my scales. During that time I was not afraid of a suit cause Lippman told me they were practically at a standstill. I asked him if they could condemn them. He said "No, they could not." He said they could not condemn them because of this proceeding you have on here now. I understood the substance of Mr. Lippman's reply to me was that they were at a standstill until the determination of this suit.

I have a conditional sale contract with the Standard Company. It is an installment contract. My conversation with Mr. Lippman made me want to look things up a little bit to make sure. I did not feel that I could lose anything if there was to be anything lost.

This screw that I am familiar with upon the scale under the pan, the purpose of that screw is at the change of the temperature to regulate it.

New York,

Wednesday, December 8th, 1915.

Before Hon. Charles M. Hough, D. J.

Messrs. Wellman, Gooch & Smyth, by Herbert C. Smyth, for Complainant.

Egburt E. Woodbury, Attorney General, and Edward S. Griffin, Esq., for Defendant.

George F. Monaghan, a witness called on behalf of the complainant, being duly sworn, testified as follows:

Direct examination.

By Mr. Smyth:

I am an attorney and counseller-at-law of the Bar of Michigan. I am the attorney there of the complainant, and have been for some time past, since its organization.

I know Mr. Farrell, the defendant in this case. I first became acquainted with him about the 15th of August, 1914, at that time I had heard of the proposal to promulgate this rule from the State Superintendent regarding computing scales. I had received information with reference to it, by wire and by letter addressed to me in

New York City. I then called upon Mr. Farrell and had a conversation with him respecting that subject. At that time the rule had not been promulgated.

71 The whole conversation consumed a considerable length of time. It covered the matter of the Standard computing scale, and its method and manner of manufacture, and what was purported to be done by it. I asked Mr. Farrell as to the promulgation of this rule. He told me that such a rule had been determined upon by him, and had been printed for the purpose of circulation. It was to be mailed that day, from Albany. I saw him, I should say, about 11 o'clock in the morning on the day on which it was eventually mailed from Albany.

I asked Mr. Farrell what his reason was for promulgating this rule, without any regard to ourselves or communication to us, and he said that he had nothing whatever against our scale. I asked what defect there was in it, and why it did not satisfy the requisites of law and justice of weighing and so forth, as well as any other scale that was on the market. He said he did not know. I then explained to him the manner in which our scale provided for compensating changes in atmosphere, and he said, "Frankly, Mr. Monaghan, I do not know anything about scales. I never had a complaint against the Standard Computing Scale Company. I made no investigation or examination of the Standard Computing Scale before I made this rule. I am not a mechanic. I do not know much if anything at all about scales, and promulgated this rule without any consideration of it further than this, that I had some complaints about a scale, which was not the Standard Computing Scale, from one of the sections of the state. I found a rule with reference to compensating for atmospheric changes which had been promulgated by the City of New York. I thought I would adopt it, and I adopted it without investigation."

I told him that I thought that he had done us an injustice, and I told him that this would reflect very seriously upon the Company's business in the State of New York. I told him about the fact that there were scales in the State of New York, at that time which were sold under contract, and that the result would be that we would be unable to collect moneys upon those scales, if that rule was promulgated, and circulated through his deputies; and I also told him that not only in the City of Buffalo, City of New York; but as well through the various states of the Union it would very, very seriously and detrimentally affect our business, because we were under serious competition from the Dayton Computing Scale Company of Dayton, Ohio, who had a monopoly upon the thermostatic device which they insisted upon being put upon scales under the rule, and that it was impossible to comply with that. That would be advertised throughout the various states in the Union, as was the custom of our competitor, and injure our business extremely seriously in those various other jurisdictions.

He said to me, "Mr. Monaghan, if you had this talk with me, if I had had this talk with you, prior to the time of the promulgation of this rule, I do not think I would have promulgated it. But," he said, "It is already printed." I said, "It is not circulated as yet."

He said, "No, but it will go out on this afternoon's mail from Albany." I then said, "Can you not wire and have it stopped?" He said, "Well, it would look rather peculiar in me,—I am lately in office—to make a rule one minute and then the same day of its promulgation change it." He said, "I would be subject to criticism on the part of the press and I do not like to do that." And then I asked him if he would not follow it up with another circular,
72 to the effect that that rule was abrogated; and for the same reason he said he did not like to do that at this time, but if we had an opportunity to afford him the information relative to our scale and its mechanism and its manner of working, etc., before he had printed this rule, he thought that his action would have been different.

He gave as his reason for not stopping it at that time, particularly the fact of the expense that it would be. He said that not alone our rule, not alone the rule that applied to us, but various other things were printed in the pamphlet, and it would require a reprinting of the whole thing in order to correct its circulation. I asked him to give a reason why a scale such as is described here, a combination spring and lever computing scale, should have a thermostat to compensate for changes in temperature, and he said he did not have any. He said he did not know anything about it, he was not a mechanic and had not given that matter any consideration.

That is the whole of the conversation that I recollect, as bearing upon the matter that the Judge signified as being of moment in this case.

The rule afterwards came out.

Cross-examination.

By Mr. Griffin:

This conversation with Mr. Farrell was in August, 1914. Mr Farrell told me he had been appointed a short time before. I do not know the date.

I do not know that Dr. Fritz Reichman was State Sealer of Weights and Measures during January of 1914, but I assume that that is a fact. I know that he was before Mr. Farrell was.

I have seen the original letter of which that is a copy (receiving paper). The date is January 5, 1914, addressed to the Standard Computing Scale Company, Detroit, Michigan.

I have seen, since these proceedings began, a copy of such a letter. When I say since these proceedings actually began, it was in the course of the after discussion that I did see a copy of such a letter, together with other letters of similar nature sent by Mr. Reichman. I saw the table of tests which are said in the letter to be attached thereto. I read those I think, recently. I do not purport to know anything definite with reference to these matters, excepting that I did read such a letter. As to the reading of the tests indicated in the letter I do not think I did, but the matter is summarized in the letter itself.

Paper marked Defendant's Exhibit 1 for identification.

I did not state a minute ago on direct examination that Mr. Farrell stated that without any knowledge of the scale, he had nevertheless condemned it. He did not use the expression "without any knowledge of the scale," because he did have knowledge of
73 the scale, at least to the extent of knowing that there was such a scale in process of manufacture and sale, but he said he had made no examination of the scale and knew nothing with reference to its merits. He made no reference then to the examination which had been made by his predecessor.

THOMAS F. COMERFORD, a witness called on behalf of the complainant, being duly sworn, testified as follows:

Direct examination.

By Mr. Smyth:

I am the President of the complainant and have been familiar with its affairs since its organization. I am familiar with the extent of sales that have been made of this scale in the State of New York, as well as in the other States of the Union, prior to the 15th of August, 1914, more particularly with the State of New York.

We are selling through our agencies, for sixteen months to users, and a pretty good trade had been worked up.

From April, 1913 to August the 15th, 1914, a period of sixteen months, we sold 206 scales, an average of about 13 per month. After the rule went into effect, from August 15, 1914 to December 2nd, 1915, a total of 15 months of 49 scales, or an average of about three per month.

During the past twelve months, the total sales have been about ten scales in the State of New York altogether. These ten scales were confined to the one district where a sealer refused to obey the mandate of the State Superintendent, around Buffalo, New York. I do not know that the sealer there refused to obey the State Superintendent. The only thing is that we know that our scales are not interfered with in that particular district.

We had twenty to twenty-five written complaints come to us with respect to the enforcement of this rule of the State Superintendent from customers.

I cannot recall now a single state in which our scales are not sold, except the State of New York and one city in Ohio. Our company has been in existence since April, 1899, practically sixteen years and a half.

From time to time, I have come across advertisements which have been put out since the promulgation of the rule of Mr. Farrell, referring to that rule and the fact that our scale has not a thermostat automatic device, quite a number of them have passed through my hands at different times.

I am not very familiar with the mechanical parts of our scales. There is a device on the scale for taking care of compensating for changes in temperature, and has been for I would say approximately two years, antedating the 15th of August, 1915, about a year. I

recall no complaints with regard to that device from any authority other than the State of New York, other than in the State of New York where our scales are sold.

In our company that mechanical device is tested in each instance before a scale goes out, and the reports that I have in nearly
74 all cases where it has been mentioned, have praised the device.

I cannot recall a single instance where the device has failed to compensate for changes in temperature.

In the sale of our scales throughout the country, and in the State of New York, prior to the promulgation of this rule, our company realized a fair profit from the sales.

Cross-examination.

By Mr. Griffin:

I was testifying as to letters received from certain of our customers in New York City at the promulgation of this rule, to the general effect that their scales were being condemned or denied a seal in this State. The model of scale that we had sold in New York State and concerning which the customers complained were a number of them, of that model there (indicating), absolutely the same—not all of them, but a number of them.

We do not sell scales in Canada. We have a type of scale adopted by the Government there, but we have not offered them for sale. I think offhand that that type has an automatic thermostatic device.

In regard to those scales that we sold in the past in New York State, I cannot say positively as to whether the thermostatic device is soldered or molded into the frame as it is in this sketch here, or whether it is removable. There is greater freedom of access to this part of the scale in some of the ones that were previously sold in New York than there is on this one (indicating).

R. D. Q. 49. You have been asked whether there is an automatic thermostat on the scale that is sold in Canada. Is it so that under the Canadian law, the automatic thermostat patent in this country is not enforced and you have been using the patent there in Canada?

A. As I recall it, it is one of our own applications over there, this patent.

By the Court:

Q. 50. Do you accurately know?

A. I do not.

The Court: I do not see what bearing the actions in Canada have on this matter. Of course, I may be in error as to that.

Redirect examination.

By Mr. Smyth:

There were no complaints that I recall from customers with regard to the accuracy of our scales, or with regard to their buying of

scales or objecting to them prior to the 15th of August, 1914, when this rule was promulgated by the State Superintendent. All of these matters come under my supervision.

75 FRANCIS C. OSBORNE, a witness called on behalf of the complainant, being duly sworn, testifies as follows:

Direct examination.

By Mr. Smyth:

I am designer and developer and manufacturer of special machinery and patentable devices. For the past seventeen years I have been, for the greater part of the time, connected with the development and the manufacture of scales of this kind. I have been inventor and designer and general manager, general manager of the manufacture and sales. I am pretty well familiar with the various spring and lever scales, and spring scales, and spring and lever computing scales, and spring computing scales, in use in the United States, and have designed and manufactured such scales.

I am familiar with the so-called devices used to compensate for the variations of the temperature in the springs. The variations of temperature affect, in spring scales, the springs, and it affects all spring scales, whether they are spring and lever or whether they are spring and lever computing.

By the Court: In other words, any machine that is actuated by a spring, or governed, or regulated, by a spring, is subject to variations owing to the contraction and expansion of the metal in that spring, and all practically about the same effect.

By Mr. Smyth: The fact that a scale is a combined spring and lever scale, does not make any difference with regard to the effect of the temperature, whether it is spring and lever or whether it is simply a spring scale. On ordinary spring scales used throughout the United States, I have never seen any device for taking care of, compensating for, the variations in temperature, in this part of the country, in this state, particularly.

I am familiar with the Twentieth Century Scale manufactured by the complainant. This scale (indicating) is known as a computing scale of the drum type. That is, it has an indicator in the form of a drum in the upper part of it (indicating).

By the Court:

Q. 21. "This scale" means an article known as the Twentieth Century Scale manufactured by the complainant at the present time in the court room and introduced in evidence as physical Exhibit A in this case?

A. Yes. The indicator is operated by a rack and pinion and there is a rod runs down from the rack to the lower part of the scale which contains the platform levers which are a little different from the ordinary platform, that does not signify here because the main lever,

or the long lever, as it is termed, is practically the same as this attachment.

(The casing is taken off so that the interior mechanisms can be seen. Mr. Osborne explains the mechanism to the Court.)

76 By Mr. Smyth: This temperature indication in the mechanical thermostat which I have described, has been tested and found to be accurate, and this mechanical device that I have explained is very accurate for taking care of the changes of temperature. I know the automatic thermostat which has been approved by the State Superintendent and his sealers.

So far as changes in temperature are concerned, and the difference between a spring scale, a spring and lever scale and a spring and lever computing scale, requiring an automatic thermostat as I have stated, all springs scales are affected by temperature and they are all practically affected the same amount. That is, a twenty degree change in temperature will amount to about an ounce in effect.

By the Court: That does not seem to depend upon the size of the spring, because if a spring is longer—I should have said this. I should have said that for a given amount put upon that.

By Mr. Smyth: I cannot see any necessity for having an automatic thermostat on any scale.

I am familiar with patent subjects. I have made a study of them in relation to spring scales and am familiar with the patent which covers the automatic thermostat for spring and lever scales, the Ozias patent. I think that is a basic patent.

That is the patent.

Mr. Smyth: I offer that patent in evidence, the patent to Ozias, No. 648,289.

Marked complainant's Exhibit C.

The Dayton Company is the only one I know of manufacturing the automatic device for a combined spring and lever computing scale under the Ozias patent. And that is the only corporation which manufactures the combined spring and lever computing scale with the thermostat. It is the only one I know of, yes.

By the Court: I am not acquainted with any other automatic compensation except along the lines which I believe, as a patent attorney, to be covered by the Ozias patent. I do not know of any.

Cross-examination.

By Mr. Griffin:

In my examination of this scale at the factory, I have had it practically all apart at different times. I have seen the scales put up, similar scales. I do not know of this particular scale.

I know how many points of adjustment there are on the scale,

factory adjustments, taking all the factory adjustments, all the different adjustments they make, I should say there are five
77 or six. This drum here has to be weighted. Then the drum has to be correctly hung and balanced on the main rod running through (indicating). And each one of these springs (indicating). This rod running through from the springs to the levers (indicating) in one piece. There are not several pieces, simply the parts for carrying the agate bearing. That mechanical adjustment (indicating) below here, does not shift your point of adjustment, your support of your springs. It shifts the support of the lower end of the rack. This point of adjustment here under the drum where the face has been taken off raises and lowers the point of support of the springs. On all these adjustments, if by accident or otherwise, there should be any misadjustment, it would be likely to affect the zero balance. The honest merchant discovering that, and not understanding the scale, could by turning the mechanical arrangement below, shift the point of support so as to bring the scale to zero again, and still the scale would be wrong throughout its graduation, and might multiply with increasing quantities and increasing prices. This plate removes (indicating), and this piece to hold the plate also removes (indicating). And this plate is made so it will co-ordinate with the scale at the time it is set up. That is, the plate has to be of exact weight for each scale. A larger plate or a broken plate will throw the scale off zero. A piece of paper on the plate might throw the scale slightly off zero.

Taking the dashpot below, it is true that if dirt gets in there the scale may loosen up its accuracy. That is true of all scales. I do not think that can be compensated for with this mechanical device below. The scale will be sticky just as any scale would be. It would not be constant so as to be corrected by any device of that kind.

If it stuck once below zero the merchant could move it up to zero with the mechanical device below. You can do that with any scale that has an adjustment for zero. Here is a little cheap scale which has an adjustment for zero (indicating).

I see that screw-driver there. I used that in handling the scale (indicating). That screw-driver fits the adjustments in the machine. It fits this adjustment here (indicating), the adjustment of the springs up and down, raising and lowering the point of support. Such a screw accompanies that.

This platform can be taken apart as I have done, and this screw-driver is supplied with the machine.

Screw-driver offered in evidence and marked Defendant's Exhibit 2.

I want to add to one answer I made. The statement that this adjustment to zero by this means here (indicating)—any adjustment may be made by this to zero, can be made by the zero adjustment of any scale which has the zero adjustment. For instance, if the springs are lengthened so that the scale will weigh longer, that can be done by lengthening the springs here (indicating). Any scale may be set to zero by the zero adjustment. This scale

can be operated in the same way (indicating). That is, you may turn these screws so as to lengthen it. The springs will weigh long then.

Then the statement about these screw-drivers, which are
78 furnished with any scale—you simply set it at zero and it is apparently all right so far as the customer is concerned, or anybody who comes in, but in all these matters the sealer of weights and measures, the Inspector will be able to detect the defect.

If the adjustment was made, as stated here, this is changed (indicated) so that the scale will weigh long, or a piece is chipped here off the platform, or anything happens to it by which the scale can be made to weigh fraudulently by turning this and by turning that (indicating), those two adjustments (indicating), this adjustment being arrived at by getting into this plate and loosening a set-screw and turning it here with a wrench (indicating), both of those adjustments must be made, and if the Inspector comes in and finds the scale set at zero, and when he puts his weight on there it weighs wrong, he will look at 60—he will find that temperature dial is wrong, it indicates forty degrees when it ought to indicate seventy—it is set wrong. He says, "You have been tampering with that scale." He knows absolutely the man has been tampering with it.

Redirect examination.

By Mr. Smyth:

This can be done with regard to changing the correct weighing where the automatic thermostat is used. In the scale that I examined with the automatic thermostat I found this condition: The thermostat is located in the base; that is, with the levers down below the platform. The springs are located in the upper part of the scale. Now, the temperature differs in those two points. This scale, even if it is properly sealed in the factory, will not weigh correctly because the temperatures are not the same and that happens practically in a great many places this way. The temperature of the room goes down to 30 or 40 at night—the place is heated with a stove, perhaps—and the thermostat in the base being located in a very heavy part, that part weighs 17 or 18 pounds, there is a counterbalance there of cast iron which encloses this thermostat so that the thermostat takes on that temperature of that heavy piece of iron. That acquiring the temperature, the spring will acquire the same temperature, practically, and then when the room is heated up with the stove in the morning the springs are normally heated up, the thermostat remains practically the same. I found by actual test from 58 degrees in a room that the two parts will not co-ordinate under five or six hours, so that during the time that this heavy part, 17 or 18 pounds of cast iron, is warming up, would be a practical difference in the weighing. It would not weigh as it does when both parts are of the same temperature.

Again, the thermostat did act as this screw does, only in that scale it moves the pivots (indicating) which should be accurately placed; it moves the pivots. Now of course, those must slide on this casting,

underneath this casting (indicating). There is considerable friction there. They have tried to do away with that friction by putting in balls there.

Now, a thermostat is made up of a number of pieces, I think the thermostat is about seventeen pieces—the thermostat is very readily affected by pressure of any kind. It is very sensitive to pressure, and it has to move these pivots out in the proper length, so as to lengthen or shorten the lever. Friction affects the action of the thermostat.

79 Again, that part being loose (indicating) the peculiar arrangement of the parts is such that you can readily place something in there to prevent the action of the thermostat, so that the scale will weigh long.

I have used a match, or any little piece of stick when placed in there, so that the thermostat can't operate.

One of the most serious objections to the thermostat is being affected by the temperatures; the scale, as I found it, was hardly ever accurate.

All I said in my last answer relates to the automatic thermostat. I want to add just one word. The operation, or the method of making the thermostat weigh long in that case can be so adjusted that it can be taken out so that an inspector coming into the door of a store, before he could go from the door where he could see what was being done, it could be put back into normal condition without being detected, and that could not be done with this adjustment here.

It cannot be done with the Standard Computing Scale, and that, I understand, is the requirement of the inspectors all over the United States, that any instrument for changing the operation of the scale, any means, shall be such that a screw-driver, or some other outside instrument, shall be used so that it cannot be done quickly, so the inspector will observe it being done if he got into the store. The automatic thermostat I refer to is the only one in use (indicating). A dishonest merchant can defraud the public, quickly, without the inspector or any one else noticing it. He simply slips a little weight in there. That moves the pivot in and makes the scale weigh long. Now, the thermostat cannot work (indicating). When a man comes in, he takes that out and says there is something wrong with it (indicating). This is set at zero.

That does not show at all to the customer when that is wrong (indicating). The inspector would not see it, probably. He would find it out after he put his weights on the scale, but it could be easily taken out.

Now, to do anything of that kind with the complainant's scale you have got to have a screw-driver in two places and a wrench in another place. And in this all you have got to do is put a match in.

Mr. Smyth: I offer this in evidence as being physical Exhibit B.

Marked Complainant's Physical Exhibit B.

I know the instructions that go out with each scale of the Standard Computing Scale Company; those are the instructions.

Instructions offered in evidence and marked Complainant's Exhibit L.

DANIEL C. PALMER, a witness called on behalf of the complainant, being first duly sworn, testifies as follows:

80 Direct examination.

By Mr. Smyth:

I am the assistant general sales agent of the complainant.

Since the regulation of Superintendent Farrell with regard to automatic thermostats has been promulgated, I have travelled through this State of New York to various customers and agents and interviewed them and sealers.

I have been told by customers who had our scales in their possession that the sealers have told them that they would not be allowed, that they could not seal scales because they were not equipped with an automatic thermostat.

I have been told by sealers of weights and measures that they could not seal our scales for the reason that they were not equipped with an automatic thermostat, and that they had been directed by the State Department not to seal the scales of that type unless they were so equipped.

Defendant's Proofs.

FRITZ REICHMANN, a witness called on behalf of the Defendant, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Griffin:

I am at the present time an employee of the Fairbanks Scale Company in this City.

For six years previous to the appointment of Mr. Farrell, the Defendant here, I was State Superintendent of Weights and Measures for the State of New York. My graduate work in college was in the line of physics and mathematics and then I was technical expert for an instrument concern in Chicago, and after that with a concern in Troy, New York. They make scientific instruments, instruments of precision. I was then appointed Superintendent of Weights and Measures.

I have had occasion to examine the scales manufactured by the Standard Computing Scales Company. I examined one of the scales some time in January, of 1914, or December of 1913, at the request of Mr. Palmer.

(Copy of letter dated January 15, 1914, and addressed to the Standard Computing Scale Company is shown to the witness. Witness reads letter.)

So far as I know, that is substantially the letter I wrote, or a copy of it. As far as I know it is a true copy. Attached thereto are certain tables which must have been correct, otherwise I would not have sent them out. Those were made under my directions.

Offered in evidence and marked Defendant's Exhibit I.

That, however, was not a scale similar to that one, not like
81 that one—not like the scale that was offered as an exhibit.

In March following the January in which I wrote that letter, and made those tests, I resigned as State Superintendent of Weights and Measures and about three months ago became connected with the Fairbanks company. After writing that letter condemning the scale of the Standard Computing Scale Company, I took no further action and made no specifications in regard to it.

By the Court:

I was in Court while Mr. Osborne was orally explaining to you the mechanisms of the Complainant's scale, physical Exhibit A, and heard it. The only statement I would make in regard to the explanation of the operation and functioning of the device which Mr. Osborne made would be in amplification of Mr. Osborne's statement, namely, that the effect of the temperature on the spring is two-fold, first, the lengthening of the spring, and secondly the changing of the elastic characteristics of the spring, due to changes of temperature, and substantially the elastic qualities of the spring are the same with ordinary steel springs. I mean substantial within reasonable limits—within limits of a crude piece of mechanism in the shape of a commercial scale.

Within the intended limits of operation of an ordinary commercial scale, the change of tensility, so to speak, of a steel spring owing to changes in temperature, is not important, but is the same with different springs made at different times. In other words, there is not enough variation. In other words, the product of manufacture is sufficiently constant. It is, however, important, because such devices are supposed to take care of both of those factors, that is, both change in tensile properties and the change in length. Otherwise, as I have just noted, I have no exception to take to the mechanical exposition of Mr. Osborne.

Your Honor, speaking of the spring and lever arrangement of the scales I would like to state, however, that I take one more exception to Mr. Osborne's statement, if I interpret him correctly. Namely, that the scale in its reading was similar to the ordinary spring scale which is, however, *I* little bit different, because in the one you have only pound and ounce values and in the other you have computing values, and in the ordinary spring scale you only have to move the mechanical mass of a pointer whereas you have to move a considerable sized drum. Therefore, I think that does not enter into the mechanical end of the scale in this action.

By the Court: That does not afford any criticism upon the explanation of the function, that is simply the physiological side.

By Mr. Griffin: This scale is called an automatic scale, as far as I know it has always been called an automatic scale. An automatic scale is a matter of opinion. Technically I should consider an automatic scale one that is automatic in its action, namely, that when a weight is placed on it, it automatically records the weight of whatever it is supposed to record.

82 By the Court: This is a matter of definition, because in a broader sense an ordinary even arm scale, if it was used for putting up two pounds would become an automatic scale.

By Mr. Griffin: An automatic scale, as ordinarily understood, is a computing scale in which if you place one pound upon the platform, it automatically records or indicates, I should say, the price of that commodity at a certain price per pound, and it does this exactly, irrespective of whatever condition might arise. The result of slight error in such a scale as compared to a slight error in a scale which indicates pounds and ounces only is this: A scale that indicates pounds and ounces only, practically in every scale that I know of, an indicating scale, the pound and ounce values are broader spaced, and you make your computations from a chart which is an outside operation, and the automatic scale is supposed to make that computation for you, so that a slight error means an error in dollars and cents which the scale makes and which is not made by the mechanical operation.

Cross-examination.

By Mr. Smyth:

After I wrote the letter of January 15, 1914, changes were made in accordance with my suggestions in the Complainant's scale, in all except in one. Afterwards I wrote the letter, a copy of which you hand me (witness reads letter). That is substantially a copy of the letter I wrote.

Letter offered in evidence and marked Complainant's Exhibit E.

My opinion of the thermostatic device is still expressed in that letter in connection with the other letter. I was the predecessor of Mr. Farrell, as Superintendent of Weights and Measurements in the State of New York. No rule such as was promulgated by Mr. Farrell was promulgated by me. During the administration of my office there was no such requirement. I had gone into the subject exhaustively.

I am familiar with the Dayton scale. It is true that the Dayton scale with the automatic thermostat can be used either purposely, or be made by accident to produce errors, the same as any other scale, any scale can.

Redirect examination.

By Mr. Griffin:

It is still my opinion that the requirements of an automatic ther-

mostat cannot be of essential objection as it is one which no honest or fair-minded official has a right to require.

As I stated to Mr. Smyth in connection with the other letter of Mr. Palmer, I suggested that that thermostat should be carried out to the front so that the customer could see whether there was any change made of that. I think that appears in the other letter, and after that I did no believe any fair-minded person could have any objection to it because that, of course, shows upon the face of it what has been done.

By Mr. Smyth:

83 It is a mere matter of adjustment of the mechanical thermostat, and then I would approve and seal, if I were still superintendent, a mechanical thermostat as well as an automatic thermostat adjustment, so that the consumer could see what was going on.

Redirect examination.

By Mr. Griffin (continued):

At the time that I wrote this letter marked Complainant's Exhibit E I was not State Superintendent of Weights and Measures for the State of New York. I had just resigned. That was an expression of my personal opinion. That letter was addressed to Mr. Palmer of the Standard Computing Scale Company.

By the Court: That is the gentleman who has testified here today.

By Mr. Griffin: My relations with Mr. Palmer were of the friendliest kind. He and I have been friends for ten or twelve years, I suppose, at least. I was desirous of helping Mr. Palmer i nevery way that I could, in my official tenure of office, at any rate.

Recross-examination.

By Mr. Smyth:

R. X Q. 50. I suppose that your friendship for Mr Palmer was close enough to permit you to express your real and honest opinion rather than to conceal it; is not that so?

A. I hope I have always tried to express my honest opinion.

JOHN F. FARRELL, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. Griffin:

I am State Superintendent of Weights and Measures. I have an office in New York City and in Albany as well. I have been State Superintendent since about March, 1914.

When I was appointed to the office and got in—just got into the office—I found that there was a great talk about some sort of a fixed

device for taking care of the change in the springs due to the change in temperature. They were talking about thermostatic devices, and automatic devices, and all sorts and kinds of devices, so the first thing that came to my attention was in regard to some sort of a compensating device for a spring and lever computing scale.

I went into it pretty thoroughly and spent days and nights at it, went through the Canadian specification, and Wayl, who is the man up there in charge of weights and measures in Canada sent me down some old long letters and tests and everything else that he could to me, and I spoke with other scale men that I could meet, those who were experts, and those who were in the field, and I had, of
84 course, the advice of the experts in the department that were brought up under the doctor's tuition, that is, Dr. Reichman, and also the very elaborate tests and the results of the very elaborate tests made by the department of Albany. Mr. Palmer came there quite often to see me. Mr. Palmer is the man who has testified previously. We had some very interesting talks in regard to the whole matter.

Then the specification as appears in the printed bulletin there of August, 1914, was promulgated. This examination into the requirements took from March until August. I consulted with sealers of weights and measures throughout the state, those whom I thought had any knowledge on the subject at all.

I consulted with Mr. Hartigan of New York City. I spent days in New York City going over the matter with the committee in charge of testing here. In New York City they have a serialization law in which you cannot sell any measuring device unless it has been passed on by the department and a serial number given to it, and they had an elaborate series of tests of the Standard scale before they promulgated practically the same rule, and I had, of course, access to all their reports, besides the wonderful help that they all gave me there.

The Commissioner of Weights and Measures in the City of New York had a rule in effect in regard to a compensating device similar, or the same, as the one finally promulgated by me. The City of New York goes further than the state itself because the City of New York has taken their common Council and passed a serialization law so that a weighing and measuring device cannot be sold unless the type has first been approved by the department.

At the time I promulgated my ruling there was the same rule in existence in the City of New York and had been for a long time, and in Canada.

I consulted with other authority besides the Canadian authorities, and the New York authorities, scale men and local sealers. I went the limit. There was not anyone else I could think of. I took it up with every one that I thought knew anything about it. I even went so far to go to some of the old teachers of mine in physics and talked it all over with them and had a very interesting time. I thought that there was not much in weights and measures until one week after I got into office.

I consulted with the Bureau of Standards in Washington. They

had made very elaborate tests and they suggested to the conference of weights and measures officers which they held every year in Washington, that is from all over the United States—the committee suggested to the conference there that some such specification be put in their model specifications. I have a copy of their specification. They have, what they call the model specification and suggested that each one of the states that has authority to adopt it, that they adopt this certain specification. However, that specification was never adopted by the conference. It is to the same effect as my specification here, of the State of New York, and the City of New York.

The specification in issue here was not promulgated by me with the Standard Computing Scale Company alone in mind.

85 There was another scale, a Lancaster Scale Company, they have a spring and lever computing scale made over in Lancaster, Pennsylvania. They cannot sell their scale in New York City or New York State, due to the lack of some sort of an automatic device, an automatic compensating device.

I will state the reasons why I adopted so broad a rule as to require an automatic compensating device upon all automatic computing scales. An automatic computing scale is read not by its weight values, as appearing there, it is all read in its money values and the graduations there, under the regulations of the State of New York, or the City of New York, it was practically the same throughout the state. The graduations are all in one penny graduations.

The consequence is that any slight change in the scale is read not in weight values, but in the very minute money graduations. The real money value appears, or is supposed to appear, and appear rightly on the face of the scale. Now, any little change in a scale of the character that we are talking about here, is shown in money value so that it must be nearer what we all are trying to do, to get exactness, it must be nearer exactness than some other sort of scale.

Now, you take a spring and lever scale, or a computing scale such as this is here, that device by which the ratio of the scale can be changed, where the zero point can be reached, where it has been thrown off, due to anything due to any one of the adjustments, one of the little lead weights on your drum might drop down or spring come off, or any little thing that might throw your scale out of adjustment, it could be brought back with this change of leverage, where it would be at a zero, and with an increasing sort of geomet-ical progression right straight through of your error until you get up to the full capacity of your scale, whereas take a scale of the character that is on the table there.

I will explain why I promulgated such a rule in regard to a spring and lever computing scale and did not promulgate such a rule in regard to an ordinary spring scale. Take the scale which is on the table there alongside of that (indicating), that is a spring and lever scale. There is no adjustment that is needed to change a lever—the consequence is when that is thrown off of zero you put it back to zero, and no matter how it is changed, or how it is thrown off, due, for instance, to the change in temperature—when that is thrown back to

zero by your spring adjustment, it is taken care of all the way throughout its whole range of graduation with a very slight change due to the change of the elasticity of the spring itself. But throwing that back to zero practically makes your scale perfect, or what we call perfect. That is as near perfect as a human mechanical thing is, and it is correct all the way through to the whole range of graduation whereas in the other scale it is incorrect.

The ordinary spring scale will not multiply as the dial goes around to the higher price while a spring and lever scale will multiply and the defect increased, because—take a computing scale with the levers on. It is never—that is there is never the extension of that spring in a scale of that character up to the full limit, up to its full capacity, as it is extended in a straight spring scale, because you get your ratio there and every little error is pratically multiplied.

86 I promulgated such a rule in regard to a spring and lever computing scale and did not promulgate such a rule in regard to a spring and lever ordinary weighing scale that indicates only ounces and pounds, because as I have just told you, with a computing scale it is money values and where you put it back with your lever adjustment, as they call it, the thermostatic adjustment, it is really a lever adjustment, if it is out of gear for any other reason, your error is multiplied on your drum, whereas on another scale without the lever adjustment if it goes back to zero it is practically correct all the way through.

Take the marked graduations, for instance, on that spring and lever scale there, they are larger than the spaces between your graduations on your drum scale. They are very much finer in here (indicating), they go down to about one six-hundredth of an inch.

I can testify from my experience that a slight defect in a money value will result in greater loss to the public or to the merchant than a slight defect in a scale which indicates only pounds and ounces, because a man who uses a computing scale behind a counter very seldom looks at his weight indications.

In the promulgation of this rule, I was actuated by no impulse of bad faith towards the complainant. My relations towards the officers of this company whom I have known have been very friendly. I appreciate their ability and I know practically all of them.

I recall Mr. Monaghan testifying to a conversation he had with me in August of 1914, on the day during which I sent this rule throughout the State. I had quite a number of conferences and consultations with Mr. Palmer and I advised Mr. Palmer that I was about to promulgate such a specification and he said he was very sorry it was going out before their Mr. Monaghan came back, who was abroad, and he was expected back, I think it was Saturday morning and I was in the office the Saturday morning, Mr. Asch was in the room next door, this was at No. 55 Liberty Street, New York City, and Mr. Palmer and Mr. Monaghan came in there and we did not go into the merits of the scale at all. We were talking about the loss of business, of the enormous loss of business it would cost the Complainant Company to lose if such a rule were promulgated, not only on account of the loss of business in the State of New York, but the feeling

throughout the rest of the United States that if New York State did such a thing there must be some cause for it, and I advised Mr. Monaghan, I said, "I was very sorry but I could not stop it. I thought it was my duty to promulgate/ such a specification," and I promulgated it, and I found since that the specification went out on Thursday. Mr. Monaghan was in the office on Saturday. The specification had already been made. It had been printed and mailed on Thursday.

I have made a re-examination of this scale since this rule was promulgated. Mr. Palmer asked me if I would go over the matter again and I wrote to him and asked him to send a scale up to the State Department. They sent a scale up to the State Department and I had it up there, I think, four or five months. I took it all apart
87 and examined it very thoroughly and did not change the specification.

Cross-examination.

By Mr. Smyth:

I am a lawyer by profession. I am not a mechanic in any sense. I commence to think I am now, some parts of it, at least in a general way.

When I promulgated this rule, that was not before I made the investigation that I have been testifying to. I did not tell Mr. Monaghan that I did not know very much about it. I did not make these investigations after. I just testified I made another one after. This convention meeting where I say that the proposition was submitted to them of having a similar rule was at Washington, during, I think, during the month of May. The vote of the convention was against adopting the rule that I adopted. I do not recollect just exactly what the vote was. It was against it, but you must remember that the men who suggested the rule were much better skilled men, very much more expert than the men who were the body of the conference. That is not my opinion. They are experts in the Bureau of Standards, whereas the conference members are local officials.

My criticism is that the computing board or the computing table that is on the Complainant's Exhibit scale shows penny values. That is the criticism of all computing scales. I do not approve of any computing scale. I do not think any of them——

If you should cover the computing card on the complainant's scale, it still has the mechanical device which I say is inducive to the perpetration of fraud. I mean that it has an adjustment which is described and told exactly where it is to the purchaser of that scale by which when the scale is out from zero, for any cause whatever, can be taken back to zero, and the error would still be in the scale in a geometrical increase in error to the full capacity of the scale itself. The same thing cannot be done in the Dayton scale, because it has a fixed factor. You cannot get at that. The fixed factor is the levering adjustment; that cannot be changed the same as the lever adjustment here unless you take an axe.

I am not talking about manipulating it. I am talking about the changing of the leverage. The changing of the ratio of the scale. You can do that by inserting something here (indicating) to hold the lever back, by putting a rope around it. I never tried it with a match. I did not see it done this morning with a small piece of pencil. I could not quite see it. I suppose it can be—I will admit that.

I take back what I said, that it is nesessary to use an axe to do it. Oh, no. I say it can be held back, or held in a particular place by putting a wedge in there.

Mr. Griffin: We are willing to concede that there is no scale on the market that cannot be trifled with and tampered with dishonestly. The only question here is whether an honest man getting this scale is not furnished the facilities by the Standard Computing Scale Company by which it may be possible for him, under their instructions, to turn a scale off and at the same time have no
88 knowledge that he has done anything wrong until the sealer may come around a year or two later and find that his scale is ounces and dollars off.

The witness: My objection to the complainant's mechanical device is not that it may be used for some purpose other than temperature regulations. My objection was stated before.

By the Court:

My objection is that it is easy to manipulate and is inducive to the perpetration of fraud. I have seen a dozen of them with the tap always off. As the scale comes out of the shop in its perfect condition there is a cap on this part that has to be taken off (indicating). That has to be unscrewed first with a screw driver, and this screw driver has to be inserted in order to manipulate the inside workings of that device. Unless a person intends to change that, the mechanical device will remain correct so long as the temperature in the room is the same as the index of the temperature on the mechanical device. There is no way it can move by itself that I know of.

If the temperature in the room goes down so that it is way below the index there, then the necessity for the change is shown immediately in the zero point above. I suppose it would be if the scale were working properly. But when, for any reason, the index lines on physical Exhibit A, is not at zero, an application of a key or screw driver to the mechanical correcting device will bring the index line to zero on the indicator. I would be glad to show you that.

That is true, and it makes no difference whether the variation between zero and the index as shown upon the reading dial is caused by temperature or any other purpose, not totally disabling the machine, that correspondent between index and zero can be produced by the device of Exhibit A.

By Mr. Smyth:

It cannot be done with the Dayton scale as well, not as well. It cannot be done unless you take your whole device apart.

I have not refused to allow the sealers to seal any scale which complied with the State specifications. This specification, affects only scales which have a computing card on it. This specification affects only spring and lever combined computing scales. If the computing card were to be taken off of the scale and hung on the wall, my objection with regard to the error in weight along the line of a computing chart would not be obviated on the Standard scale. It would not violate my rule, but we have other rules besides that.

By the Court:

This rules does not apply only to computing scales. If you will allow me to answer that question, because this has another phase to it which comes under another rule.

By Mr. Smyth:

89 It does not violate the rule which is promulgated, if the computing card were hung on the wall instead of around a drum, then this would not violate the rule. If it indicated, for instance, five pounds when it should be four pounds, and there was no computation table on the scale, the merchant, either computing in his mind or reading a computing table on the wall, would arrive at the same error as he would as if the card were on the drum. And the same would be true of any scale.

By the Court:

If the scale be out so as to weigh only nine pounds when as a matter of fact there are ten pounds on the scale, then that error is always theoretically and correctly expressed by a percentage. That scale is ten per cent off. And consequently the heavier the weight that is put upon the scale while the percentage of error always remains constant, or does theoretically, the quantity of error expressed absolutely increases. And it is that fact which, when introduced into computing scales, which scales are, in my opinion, always read on the dollar mark and not on the pound sign, is particularly vicious. The percentage of error always remains theoretically constant, but you take this particular scale and throw it out for any reason and put it back with that lever device underneath the platform, it is not the same error all the way through to the full graduation. It is an increasing error.

It is true generally in a computing scale that the percentage of error is always constant, but in this particular scale, where it is out for any reason other than a change in springs due to the change in temperature, and it is brought back to zero by this device, you have a geometrical error up to the full capacity of your scale. That is, if it is a hair's breadth, off so that the human eye could not notice it

on zero, it may be four ounces off when you get to the full capacity of the scale. It is off four ounces because it is off the percentage of the larger amount. In other words, ten per cent, of one hundred is ten times as much as ten per cent. of one, but it is ten per cent. all the same you are increasing the error. The error, of course, increases with the quantity to be considered. But the ratio or percentage, however, is assuming the original calibration to have been reasonably correct, is substantially constant.

By Mr. Smyth:

You have to read the ounces by fractions anyway on any scale, but these scales are practically a precision scale. In an ordinary counter scale you do not take in the space between your graduations. You read toward your ounce graduations, whereas in a precision scale you take in the distance that your indicator rod travels in between your marked graduations. Say, on this scale, these graduations are so close together that you—that drum, when it comes in line with your red line, you have got practically a precision scale. To get the fraction weight on a scale such as is ordinarily in use as shown on the table you take it to your nearest point. If it was 64 cents a pound and it showed just between—they read it to the nearest point. What they think is the nearest point. They do not take into consideration that it is not one point or the other.

The customer on the computing scale can see the weight.
90 He can see it himself if he looks. It is there for him to see.

The merchant never sees the weight. He reads it off in money values. He never reads the weight.

If you wished to put ten pounds of meat on that computing scale, you would not know that you had ten pounds of meat on that scale until the ten-pound mark came under the line.

I heard Mr. Osborn's testimony with regard to what can be done with the Dayton scale, the thermostat part of it. I do not disagree with what he said, but he did not go far enough.

By the Court:

I do not disagree with what he said.

By Mr. Smyth:

I was not considering abrogating this rule after it was promulgated as requested by the complainant up to the month of December, 1914. I might have said so to Mr. Monaghan. I had no intention whatever of abrogating the rule unless some testimony was brought before me to show where I was wrong.

I have seen complainant's scale manipulated in such a way as I have described so as to produce any fraud in the laboratory. I have done it myself. Other than doing it myself I have not seen it done. I do not examine stores. I have reports from local inspectors.

In the laboratory the same thing could not be done with the

Dayton scale. I heard Mr. Osborne describe how it could be done, but I have tried it myself to do it and found I could not.

FRANCIS C. OSBORNE, a witness recalled on behalf of the complainant, testifies as follows:

Direct examination.

By Mr. Smyth:

Exhibit A is the complainant's scale known as the "Twentieth Century Scale" and is a combined lever and spring computing scale of the drum indicating type, that is the indications are upon the cylinder which is in the upper part of the scale and is operated from the levers by rack and pinion, and the rod leading from the drum to the levers. The springs opposing the weight are located in the column upon which the drum rests. There are two of these springs connected to the nose pivots of the power pivots and of the long lever in the ordinary way. The long lever in this scale is similar to the long lever in all platform scales of the counter type.

In manufacturing scales it is necessary that the pivots in the scales be very accurately located, in fact, they must be so accurately located that they cannot be determined—accuracy cannot be
91 determined by measuring with any instrument of precision that could be practically used. They may be approximately placed in the position in which they should be, but the final position of the pivots is determined by actual weighing upon them, and using a weight test, and they are changed in position until they stand the weight test; then, of course, they should be so arranged in the scale—they are so arranged in the scale that they are immovable except in certain scales. In the scale before me, these pivots that is the fulcrum pivots and the power pivots are never changed, unless they are changed by accident or purposely. That is, they are so fastened into the lever that they cannot be readily changed. It is quite necessary that this accuracy be maintained.

And they are accurate. Now, in some scales the power pivots are located in a movable face having a movable nose iron, and those scales are not to be, of course, changed, but are in some states, I understand, condemned because they can be moved. When the automatic thermostat is attached to such a scale the pivot points are changeable very readily. The temperature of the atmosphere is supposed to change them, move them, that is the way the automatic thermostat compensates for the effect of temperature upon the power springs.

That may be a cause of inaccuracy with a scale equipped with the automatic thermostat. It is very likely to be the cause of inaccuracy. Now, in the Twentieth Century Scale, which is the Standard Computing scale, the rack rod, that is the rod carrying the rack and which operates the indicating drum, is attached to the long lever separately from the attachment of the springs, and is movable, and the way the scale compensates—is made to compensate for a difference in temperature and the effect of the temperature upon the springs

is by making a differential effect of the movement of the lever between the movement which is caused by the load upon the springs and the effect of the movement upon the indicator. That is, if the weather is cold and the springs are contracted, and they are stiffer, and therefore do not yield as much under a given load, the indicator must be made to work faster. That is the indicating part must be so changed that it will move the indicator a greater distance than it did before in relation to the movement of the long lever; and that is done in the Standard Computing Scale by moving the attachment of the rack rod and the lever outward, so that the arc through which that part of the lever swings is a larger arc and therefore moves through a greater distance for a given movement of the lever. That is illustrated in the drawing which I have prepared, and of which I have a blue print here showing just how that operates.

Mr. Smyth: First we will have that marked in evidence.

Marked Claimant's Exhibit I.

In this drawing (referring to exhibit), the fulcrum pivot is marked "fulcrum" and the power pivots are those to which the springs are attached. The rack rod is marked "rack" upon the drawing, and is shown to the right of the power pivots at the outer end of the lever. In the first position shown in the drawing, that is the position in which the rack rod is nearest to the spring—nearest to the fulcrum pivot of the lever, the drawing is marked "W," that is the distance through which this part of the scale will move at full capacity, that is 30 pounds, which is the weight indicated on that drawing.
92 That is it will expand the spring to the lowest point indicated on the drawing, and the pivot will reach the lowermost point. The rack rod, that is the lower end which *it* is pivoted to the lever, will move through an arc indicated on the drawing and marked "W" meaning that. This distance is indicated by a line with an arrow point and is the distance through which the rack rod must travel at all times in order to move the drum sufficiently to indicate 30 pounds.

That being the capacity, now, as the temperature lowers and the temperature as exhibited here is medium, then the spring becoming stiffer will move through a less distance, and the lever will consequently be moved through a less distance and will take the medium point shown on the drawing. And in that case the rack rod if left in its original position will pass through a less distance than it did, which will not indicate 30 pounds but indicate less, therefor, the distance to which the end of the rack rod must pass in order to indicate correctly must be increased; and that is done by moving the lower end of the rack rod outward, so that it passes through a larger arc, an arc which is just sufficient to make the distance from zero to capacity,—to 30 pounds the same as before. If the temperature is still further lowered, the power pivots will go a less distance and the rack must be moved further outward as shown by the diagram under the part marked C. Now, to move the lower end of the rack rod out-

ward, we have in this scale a precision instrument which has been designed and found by actual test to compensate correctly, for change in temperature. This is in the form of a micrometer adjustments which are indicated—that are indications or indicating marks on it so that it will show when it has been moved and how much it has been moved. That is the scale may be satisfactorily set by observing the temperature and moving up to the temperature indicated upon the screw or as is practically done, the figures may be ignored upon the micrometer screw, and the scale set so that it indicates zero on the chart which will be found in the actual test to be approximately what is indicated upon the screw. Now, in order that the storekeeper, after this scale has been put in place and adjusted according to the directions sent out with the scales which are in evidence, the only adjustment that he needs to use is this adjustment for temperature. By this I mean the micrometer regulator shown beneath the platform on a long lever, operating to move the lower end of the rack rod in or out according to the necessity of bringing the scale to zero or compensating for temperature changes. In my tests of this scale which I have made, I have found this adjustment to be very accurate, in fact theoretically it may be absolutely accurate and perfect, and is positive.

It is rigid and positive and cannot be readily changed or tampered with, nor can I see any way in which it can be used fraudulently, without forming—without presenting to an inspector of weights and measures a condition which can be shown to be absolutely done with intent to defraud, and there is no excuse that a merchant could offer if he used it fraudulently, that would pass with an inspector who understands his business.

After a machine has been properly set up in a store aside from the variations of temperature, the accuracy of the scale could be affected. Some accident might happen to the scale such as the platform breaking, or after a long time, perhaps the pivots might wear
93 so as to affect it. With the weight distributed as in this scale upon fourteen different pivots with agate bearings, it would take a long time, I should say it would depend upon the abuse and the amount of work done by it. I might say twenty-five or thirty years, under ordinary conditions.

Mr. Reichmann: For careful use, one hundred years?

The Witness: Yes, I should say so.

If the platform breaks then that can be remedied, by just simply raising or lowering the springs of the scale. That would be taken into connection with this adjustment here, taking a thermostat and adjusting this adjustment to the temperature of the room. Take the indicated temperature of the room, as indicated by a thermometer, and observe how much it is off zero, and then by the zero adjustment with the scale, adjust it to zero, then that scale is accurate again. The zero adjustment is found by taking out two screws here in this plate. Underneath the drum, you will find a nut in the middle of the scale which may be moved to raise or lower the spring, and then the scale is accurate again, yes sir.

The change in the pivot might also throw a scale off to make it inaccurate. There are any number of things that might happen to a scale, if it fell off a building, or a thing of that kind, we don't know just what would happen to it. I don't think of anything that would ordinarily occur.

One of the directions to be followed in the directions sent out with the scale is that it is to be operated upon a level platform, a level surface, that is one of the requirements that is supposed to be complied with by the users of the scale. There is on the scale which shows in full view of the storekeeper in the base, a two-way level and three adjusting screws by which it may be put into perfect level. They are in the base of the scale. These ways that this scale can get out of order, are common to all scales. All these ways which are common to all scales to get out of order, can be taken care of in this scale, by keeping the temperature device accurate, in the way I have described. I examined scales of different companies. I have examined some recently. Altogether I have examined a number of scales. I believe I have kept abreast of the state of the art in the scale machine. I have just designed a scale, but haven't got it ready for the market, recently.

So far as accuracy is concerned and the prevention of fraud, I have this to say of the Standard Computing Scale as compared with any scale within my knowledge, including the Dayton scale. Considering everything, the fact that the parts that can be readily manipulated within this scale are in the frame work, I am referring to the Standard scale frame, from the standpoint of an inspector of weights and measures, which I understand to be this: That all of the requirements in regard to the change made in the adjustment of a scale that shall be so arranged that they cannot be affected except by using an outside instrument, as a screwdriver or a wrench, to change them, and I understand this regulation to be put in the way it is, because it, in that way, enables the inspector to go into a store and find a scale our of order before the dealer using it fraudulently will have an opportunity to change it back to a normal condition, because he has to take this outside instrument as a screwdriver, to effect
94 the change. If he could do it quickly with his finger or in any other manner that it could be easily done while the inspector is moving from the front of his store to where the scale is located, he might not be detected in his fraudulent use of it. Now, considering that as the criterion upon which you judge of the liability of a scale to be used fraudulently, I know of no other scale that has fewer objections, or has as few objections, that is in lever and spring combined computing scales, than the Standard Computing Scale. I would particularly point out in this connection, that the principal objection urged against this construction by those who say it can be fraudulently used is that the micrometer screw can be used to adjust it to zero, and the scale otherwise is put out of correct weighing condition, that is by changing the height of the spring here by the adjustment which I have described, to accomplish which you have to remove two screws and this plate (indicating), a plate on the front of the scale, and loosen a set screw and turn a nut with a wrench,

and then adjust the scale by the micrometer screw so that it will point to zero, and thereby making the lever longer or shorter; longer, of course, if the scale is to be used fraudulently in favor of the dealer, and the scale will still be at zero. Now, a user who will do that is putting himself in a position in which he can be detected as deliberately tampering with a scale by an inspector. The inspector comes into the room while the scale is in use, in order to put it back into the normal condition he would have to pick out these two screws, pick up this plate under the drum, loosen a set screw with a wrench, change the nut, and put it back to the exact position that it was at first, and in order to do that, he would have to mark it when he changed it before, so he could get it back, because he has no adjusting weights by which he could regulate that, and then to move the thermostatic screw to a position where the scale indicated zero. That would take, I should say from five to ten minutes, if he did it accurately it probably would take longer than that. That includes putting back that metal covering of the case. If this is not done, however, and the inspector comes to the scale and puts on his test weight and finds it out of order, it is weighing fraudulently, he will observe the micrometer screw and note that it is not set at the temperature of the room by considerable. Then he knows absolutely that the scale has either to be sent to the factory to be readjusted or that the man has absolutely changed—has absolutely tampered with it and attempted to defraud.

The computing card on the drum has nothing to do with the thermostat. Nothing whatever, so far as I can see. The mechanical thermostat should be applied to pound and ounce scales, as well as to computing scales, in order to adjust them to correct weighing. The computing chart, to my mind, is simply a convenience, auxiliary convenience for the dealer to get at the fractional amounts of the weighing. If he is weighing even pounds, of course he can get it readily either way, computing it in his head or looking at the computations of the chart, if he likes. If fractions of an ounce are indicated on the indicator, and it is indicated to the customer on the reverse side, where there is no computing chart, then the dealer in order to do justice to his customer, must estimate, if he has no chart, must estimate the fraction of an ounce. For example, upon pound and ounce scales that we have here.

Mr. Smyth: We will mark it in evidence.

Marked physical Exhibit D.

95 Physical Exhibit D is an ordinary lever and spring scale with a dial indicator manufactured by Chattillon & Sons. A regular approved scale for this city, regularly serialized and stamped by the sealer of weights and measures of the City of New York. It is used outside of the City of New York. It is the regular approved type of scale throughout the State of New York. I understand that to be the case. If a dealer is using this scale in a store like a delicatessen store in which kind of stores you will find many of these scales, and a piece of sausage selling at say sixty-four cents a pound,

is placed upon the scale is found to weigh say one pound, eight and three-quarters ounces, the dealer would have to take into consideration the fraction of an ounce if he wishes to treat his customer properly; that is, he would have to put the ounces in fractions because each ounce amounts to four cents. If he has a quarter of an ounce over, he adds a cent, and if it is a half an ounce over he adds two cents; and if in the case I mentioned of eight and three-quarter ounces, he would figure three-quarters of an ounce, which would be three cents, over the even ounce. Now, in the computing chart upon—What I am speaking about there is a scale without a computing device, a Chattillon scale, I think I so stated. There is a scale that has no computing device.

Now, coming to the complainant's scale with the computing chart, there will be upon the computing part at the price per pound that we have, sixty-four cents per pound, but this particular scale does not run up to that price per pound—There will be upon the computing chart opposite the price sixty-four cents on the line which indicates the weight of the sausage, a line which indicates the value of the sausage which the dealer in the other case would have to compute mentally, or with a pencil and paper, and the customer gets the right amount, that is on the scale, on the complainant's scale, the point is divided into a certain number of parts, say one pound at sixteen cents a pound would be divided into ounce parts. At thirty-two cents a pound the computing chart would be divided into half-ounce parts, the ounce would be divided into half-ounce parts, that is, that would be twice as many marks opposite thirty-two cents as there would be opposite sixteen cents. That is the pound in each case on this chart is taken and divided into as many marks as there are cents per pound. At thirty cents per pound a pound space, what is indicated here in the pound and ounce column, that is, the space is divided up into thirty-parts here that you would get exactly that in that distance. And in the case of this scale (indicating) the Chatillon before described, non-computing. In order that the customer who is there would get what is due him, the fraction of the ounce then must be figured and has to be observed very carefully by the dealer, otherwise he won't give his customer full value. If, as Mr. Farrell says, the practice is to take the next ounce, when there is a fraction shown, then the customer is not fairly treated and I think the conscientious dealer who is selling goods at high prices per pound would take into consideration the fraction as nearly as he could estimate.

I am explaining why the computing chart performs the same function that the dealer's judgment does in the case of the pound and ounce scale where only ounces are indicated. He must take into consideration the fraction of an ounce, if he treats his customer fairly, and he must take that into consideration, or can take that into consideration, because it is divided up for him, and he can get it
96 accurately. If he takes the fraction of an ounce from this scale and figures it mentally, he does absolutely what he does here (indicating), only it is not so accurately done.

With reference to the statement made by Mr. Farrell when he was

on the stand, that a dealer will look at the price immediately rather than at the weight, and will not observe the inaccuracy in the weight, but will immediately follow out the price, if the customer calls for weights, for his article by weight, as two pounds of steak, he will look at his weight first, necessarily, the operation is, that he cuts off a piece of meat, which is unweighed and he puts that on the scale. Now, the dealer naturally would look at the weight, as he might be so familiar with his prices, that he will know that is thirty-two cents, for instance, if it was sixteen cents a pound, but he probably would look at the weight and see how near he had got to the weight, and then would look at his chart, if it was over or under the amount and say that the value actually was.

It would be a much more remarkable mental feat, for the dealer to bear in mind the whole computation chart as related to the weight, than for him to look at the weight first and carry the line out to the price. Of course in every case where the article is such that it can be weighed accurately to the pound, like sugar, or any divisible commodity, he would look at the weight always, if it is called for by the weight. He would watch the weight advance as he poured the commodity in. I do not think he would watch the price as he poured the commodity in I have never had any direct experience in noticing dealers as to how they used computing scales.

The scale that is in evidence is a twenty-four pound capacity scale. The complainant also makes a thirty-pound capacity scale, and while I have been referring to thirty pounds I have had in mind a thirty-pound capacity scale. This twenty-four pound capacity scale had the computing chart and is based on one penny graduations. It is true that there is but one automatic thermostat in use in this State; one manufacturer of scales that I know of only who has an automatic thermostat. That is a computing lever and spring scale. The patent which is in evidence in my opinion is a basic patent. I understand that the invention made by the patentee, Mr. Ozias, was the application of a thermostat to a spring operated scale, to compensate for changes in it, the effect of changes of temperature upon the springs, and as I understand it, he used such language in his application, and his claims in his patent, that they were so stated that they broadly covered such an application of a thermostat, and unless it can be shown that someone else did it before him, it would be considered a basic patent, and the Court would construe it very broadly. I think it is true that no one else, assuming there is no one else who has invented it before him, the use of a thermostat, is confined to the owners and licensees under that patent.

The Dayton scale is of the same general type of scale as the Standard Computing scale which I have described, that is, it is a counter platform scale with combined spring and lever and indicating drum, practically the same as the Standard Computing scale, excepting that the rack-rod is composed of several parts, and has an evener at its upper end which carries the extension of the rack rod to the outer ends of the drum, where the springs are located and where the rack and pinion are which operates the drum. Rack and pinion

97 are essentially the same as in the Standard Computing scale.

Now, the automatic thermostat is located in the housing, in the long lever. The long lever in this case has combined with it a heavy counter weight, which balances, in part, the platform and a heavy cast iron arm extending upward to the lower part of the drum where there is located a check-rod; and this is necessary because the platform frame in this scale had only two bearing points upon the long lever instead of four as in the case of the Standard computing scale. The automatic thermostat is composed of a series of plates which are, some of them steel and some brass, and the thermostat operates in the manner it does because the expansion by temperature between brass and steel is different.

This is a blueprint of the long lever of the Dayton scale and shows the thermostat in place in the housing of the lever, in proximity to the heavy counterweight, and shows the connection between the thermostat and the power pivots.

Blueprint of automatic Dayton thermostat offered in evidence and marked Complainant's Exhibit J.

The effect of temperature upon this thermostat is such that the long lever is lengthened or shortened by this effect, and this is accomplished by moving the power pivots inward or outward. The part which is moved by the thermostat and which carries the pivots is attached to the thermostat at two points, and passes through the forward part of the long lever underneath, in the channel in the long lever, and carries a plate in which the pivots are inserted. This plate rests against the underside of the long lever and is held in that position against the end of the long lever by the draft upon the springs. At this point there is necessarily considerable friction developed in opposition to the movement of the thermostat. This is eliminated to some extent by a series of balls, roller bearing balls inserted between the lower side of the end of the long lever and the moveable part which carries the pivots.

The pivots being moveable, that tends toward inaccuracy, because the pivots must be very accurately placed in order to weigh accurately. The thermostat is composed of seventeen pieces, part of which are brass and part steel. These are riveted together, and are fastened to the long lever by the screws at one end. The effect of a higher temperature is that of lengthening the thermostat, that is, it spreads out and pushes forward the part carrying the draft pivots, thus lengthening the long lever and practically acting to lessen the effect of the load upon the springs. That takes place when the springs are made more resilient by a higher temperature. Therefore the load placed upon the scale will not be effective upon the springs when the thermostat has acted, as it otherwise would. The opposite effect of course is had by the temperature being reduced. The effective length of the long lever is shortened and the weight has a greater effect upon the draft upon the springs, and the stiffer spring is thereby lengthened the same distance theoretically, as it should be, as before. The rack-rod is combined in this case with the draft rod, that is with the rod that carries the springs part way up to the evener in the scale. Then the rack-rods become separated and pass to the pinions

and the other part of the other extension passes to the springs.
98 So that this thermostat not only effects the springs but it affects, to a slight degree, the rack-rod in an opposite direction, that is in an opposite direction from what it should. That is not very great, owing to the shortness of the rack-rod in this case.

The thermostat is a very sensitive apparatus, and may be moved very readily by taking hold of the part which is moved by the thermostat, and pressing upon it slightly. Any slight pressure upon it affects the effectiveness of the thermostat and anything placed in the parts so as to prevent the thermostat from operating readily, either friction upon the parts, as would be the case in the forward end of the pivots, or any obstacle placed anywhere either in the thermostat itself, between the open parts of the thermostat, or beween the lever and the movable part carried by the thermostat will affect its operation, and it is so constructed that a match or a similar object, a nail or anything of that sort, may be readily placed in between the lever and the yoke, which is carried by the thermostat, so that the thermostat is ineffective. The thermostat may be pressed back so that the lever becomes shorter by any amount that is desired, and then the scale may be adjusted to zero by the adjustment just below the drum, and in that condition the scale will weigh inaccurately to the benefit of the dealer, and still show accurately at zero. The zero adjustment may be made in another way, however.

The match may be inserted at a place which is not visible to the purchaser but is visible to the seller. It is easily put in and quickly taken out. If you do that, you make it then appear to be all right at zero, while as a matter of fact it is out by moving the zero adjustment, which is a screw in the evener under the drum which is in plain sight to the dealer but not to the customer. In that condition if an inspector arrives the match may be quickly removed, instantly removed, and the scale then of course would not indicate correctly at zero, but scales are frequently off at the zero point, and the excuse could be made by the merchant that it had not been adjusted, that he had neglected that, something of the sort. He would have an excuse, but a better method of making this manipulation of the scale may be done by, instead of changing the screw at zero, after placing the match or nail in position, and the scale indicates off from the zero point, say one ounce fast, a small amount of metal of any kind, lead or steel or anything of the sort may be easily attached by means of a little chewing gum below the outer end of the long lever, and bring the scale to zero.

This can be as quickly removed as the match from the scale, and the scale will stand absolutely at zero at any moment that the dealer wishes it to stand there in normal condition. This is the easiest and cleverest method of manipulating this scale, so as to cheat the customer that I have ever seen, the most readily operated, I mean, so that the detection of it cannot be made by the inspector, should he arrive on the scene unexpectedly. If the glass platform of the Dayton scale is broken, that scale will be off in the same way that the Standard scale would. Dirt in the parts or any other accident of that kind would also send the Dayton scale off. That could be regulated by

manipulating the automatic thermostat so as to apparently bring the scale back to zero, without its being so, as in the Standard scale, by using the match in the way I have indicated, and also by regulating the screw on the evener. In my judgment the Dayton scale is more easily susceptible to fraud than the Standard scale, in
99 those respects which I have been speaking of. In my judgment the Dayton scale is more easily changed in that way.

Cross-examination.

By Mr. Griffin:

The only way I know of how an honest merchant who does not want to tamper with the scale or trifle with it, finding it off some morning, can bring his scale back to zero by manipulating the thermostat, without doing some affirmative act in actually altering or tampering with the thermostat, in the Dayton scale, would be to use the zero adjustment; place his scale at zero, and then the scale would not weigh correctly. As a matter of fact if the temperature in the room was different during the night from what it was soon after he opened his store, he would find his scale indicating wrong because the thermostat is not of the same temperature as the springs, because they are located in different positions and the thermostat is located in a very heavy piece of iron, weighing seventeen or eighteen pounds, and will not assume the temperature of the room as quickly, by several hours, as the springs so that his scale will not indicate correctly under those conditions. His scale would be off. The scale would not weigh correctly. He would not know that unless he had test weights. There is no way that he can honestly change the thermostat so it would make a correction.

My testimony was predicated upon the assumption that the Dayton scale was off zero for some defect and not because of a change in temperature. In that case the merchant could only make the zero adjustment, but if he had any reason to suppose that his scale was not in order, of course he would have to send for a scale expert to adjust it.

Under the same circumstances, the same merchant, on the same morning would come into the store and find also his Standard automatic computing scale off zero because of some defect in it, outside of temperature. To bring it back to zero he could use the zero adjustment or he could use the micrometer adjustment for temperature, but if he had reason to suspect that there was some other cause than temperature affecting his scale, as your question assumed, he would turn his temperature regulator to the temperature of the room, observing what the temperature of the room was, by a thermometer, and if the scale was off at zero when so located, then he would know that something had happened to his scale, and your question assumed that he was an honest man and wished to honestly effect a remedy. Then he would either write to the manufacturer or get from the directions which they sent the means of adjusting his scale, or have an expert come in. He would not continue to use his micrometer regulator in a way that indicated, or so that it showed that the temperature was not the temperature of the room.

When the Standard computing scale is shipped, it is shipped assembled. I think the only assembling that has to be done by the merchant is the placing of the platform upon the scale and adjusting the dash pot. The things to do on receiving the scale are indicated on the directions which are sent with it.

I have designed a scale lately. It is not a computing scale. It is a spring scale. I have made tests in regard to the Dayton
100 scale; they are parallel with those made with the Standard computing scale. They are not made in the form of a report.

FRITZ REICHMANN, resumes the stand.

Direct examination.

By Mr. Griffin:

In describing the technical product, spring and lever scale, in general, I will substantially give a description similar to the one that I gave to Mr. Farrell a couple of years ago when we were discussing spring and lever scales and other scale matters, in connection with the general attitude of all weights and measures, officials and regulations, that broad principle that weighing and measuring devices should be so constructed so as to facilitate the perpetration of fraud, and as a protection to the consumer primarily, and then as a protection to the honest dealer.

The spring and lever computing scale is substantially an instrument which has a commodity pan or platform, which by a system of levers is connected to a counter forced system, which counter forced system in a spring and lever computing scale is the spring. There are, of course, various ways in which such a counter forced system can be constructed, but this just happens to be one of the ways, and that is only one in consideration. I shall confine myself to a spring counter forced system, and to the end of the lever by some mechanical means is connected a motion device which turns a drum, or some other indicating mechanism, in this particular case a drum, and supported on pivots, ball bearings, or rollers of some kind, which drum has considerable inertia, compared to an ordinary pointer. It is a well known fact in physics that metals expand, or contract with changes of temperature.

It is also a well known fact that the elastic properties of springs change with changes of temperature. The total amount of contraction and expansion depends upon the length of the counter-forced spring or springs which may be used, and the variation in the elastic property depends upon the material, the method in which it is manufactured and time, and various other factors; those being the principal ones. There are two facts to be considered then, and to be compensated for, the elasticity of the spring and its expansion and contraction. The expansion and contraction being one factor and the elasticity the second factor. That can be accomplished in various ways. The Standard Computing Scale uses a direct mechanical micrometer screw to change the sweep or the distance with which the lever connecting with the spring moves, and thereby attaining the

rate at which the drum is turned by means of a rack and pinion, other scales use—there are a number of methods that can be used. This could be accomplished on a scale of this kind by having a thermostat attached to the scale, which could either move the rack rod back or forth, or could change the leverage.

Physical Exhibit A is accomplished by a mechanical turning or moving backward or forward of the point of support of the rack-rod, the pivot itself is not changed. I mean moving it laterally in order to increase the sweep, so as to change the motion of the drum,
101 due to a certain extension of the spring counter forced system.

In Physical Exhibit A there is no thermostat. That is accomplished by means of a micrometer screw, which has to be actuated by some outside mechanical device, as a screw-driver, and has to be adjusted and changed for every change of temperature. This is, of course, a direct mechanical operation, and there is absolutely no question but that temperature can be thus mechanically compensated for. There is absolutely no question that you can shift it by means of a micrometer screw. For every change of temperature you can find a place where it would give a correct result. You can do that with a lever or with any other kind of mechanical device. That can be changed by an automatic device, namely, a thermostat, which would produce that motion automatically, instead of using a mechanical means; and, as stated before, that can be compensated for either by changing the rack-rod or it can be changed by changing the length of the lever, namely, the pivots, the position of the pivots. Practically there is no difference as to which is used. There would be no more error in shifting the pivots than there would be in shifting the rack-rod.

In considering the possibilities of error, I think it is absolutely essential that we consider the use to which scale is put, namely, it is a device for computing values. The total money value of the commodity placed on a commodity pan, and knowing the price per pound of the commodity; also, incidentally, it has a weight indication, namely, pounds and ounces on two sides. One to the dealer's side and one to the customer's side. The computing values, however, being only on the dealer's side.

This micrometer screw for shifting the rack-rod, namely, for changing the amount of motion transmitted to the drum, by a certain amount of motion, given to the springs or levers by the weight on the commodity pan, can be used to compensate for any sort of defect that might occur in the action of the scale, and bring the scale to a zero reading.

These defects might occur by accident or by design. The weights and measures official is always guarding against those defects, which may be by design, and not noticeable to the customer. That can be accomplished in this Exhibit A very readily by using the wrench which accompanies the scale and raising the point of support of the springs, and then adjusting the zero reading, in which case the scale will be corrected zero, and would indicate to the customer that it was correct, and would also indicate to the merchant that it was correct; when, as a matter of fact, as soon as a commodity was placed upon the pan the indications would no longer be correct.

This raising or lowering the point of support would be done by turning the screw indicated as No. 30 on cut A of Complainant's Exhibit. The method of raising that is described in the directions. It might and might not be indicated to a local inspector or State inspector that the merchant had dishonestly adjusted the screw. However, that is of very little importance, because the primary thing to consider is the consumer, who is buying over the scale, and there is nothing to indicate to the consumer to that effect. The consumer would not even know if he could see the micrometer head, which, of course, he does not see, when there is a commodity placed upon the pan, nor under ordinary circumstances would he see it if there were paper on the pan, or if the pan were greasy, which, of
102 course, you will find in most stores; because the micrometer head is divided into arbitrary numbers, which, according to the directions to the dealer, indicate the temperature, but would not mean such to the customer, if he should examine the scale in detail, as compared with non-computing scales ordinarily used in the retail trades. Every computing scale, particularly the drum type, requires the movement of a great deal more of mass, and injects into the total mechanism a great deal more friction, as introduced into the ordinary scale, and of course it is a well known fact to every one who has ever made a study of mechanics, and particularly to mechanics as applied to weighing devices, that that is one of the principal things that the computing scale manufacturers have to overcome, the friction, and the additional friction which is introduced, and their idea and object is to minimize the friction and to reduce it as far as possible, namely, to zero if possible, which is a physical impossibility. Of course in every drum type of computing scale there is a great deal more friction than there is an ordinary scale, which friction enters into the mechanism in this manner: That, however small the friction is at the point of equilibrium, namely, at the point where you wish to make your final reading, the friction enters as a large factor, because your actuating force, namely, the point of the equilibrium, between the force applied and the counter force is zero, and consequently, however small your friction error is, it is considerable as compared to zero. That makes it highly important from the economic side of scales, namely, taking scales from the point of view of those who buy over those scales. That where such factors enter particular care should be used in seeing not only that they are properly made, but particular care should be used in formulating regulations which would tend to eliminate mechanisms which facilitate the perpetration of fraud. There is no question in my mind that that scale can be very readily used in a fraudulent manner.

Its construction is so delicate that it is much more likely to be injured or harmed in ordinary use, than the ordinary style computing scale, because you have a great deal more points of adjustment, a great many more points of movement, and a great deal more mechanism to move Keeping always in mind the consumers' side of the transaction in the economic side of scales, there is an honest difference of opinion. Personally, I have always held that if the

consumer has means of knowing what is going on, that it would be no detrimental mechanism. Others have maintained just as honestly, and with just as much right, that all those actions must be automatic, and I will of course have to admit that the great majority of them are on the other side and against me; so that my position is in connection with the report that I made on the original test of this scale, that if this micrometer drum were carried through, so that the customer could see the temperature indications, and also if there was a thermometer attached to the scale, then there would be a chance for the customer to see what was going on, but without that, I think it is exceedingly liable to perpetration of fraud.

I will cover the results that might occur, and point out how the scale could be become defective; honestly, by going into it from the honest merchants' standpoint, as to what he might do with the scale by means of the compensating device used on Physical Exhibit A.

In Physical Exhibit A there are of course a number of things which may go wrong. In the first place, there may be injury
103 to the rack and pinion, for some reason which we don't know. There may be a shifting in the balance of the drum, for some reason which we do not know. There may be a change in level, for some reason which we do not know. There may be a shifting of the fiducial line, or indicating line to the dealer or to the customer, for some reason which we do not know; or there may be a variation in the drum, being made of paper, due to climatic conditions of various kinds; all of which can be compensated for by the mechanically operated micrometer screw, to change the amount of motion of the drum.

I am familiar with the use of computing scales in stores, and have examined thousands of them. Such a scale as the Standard Computing Scale, used in stores, has nothing upon it to indicate to the honest merchant nor to the customer whether the movement of the indicating device from zero is caused by temperature, or by some of these defects which might arise in the scale, and of which I have just spoken.

It is possible that there are a number of elements concerning which the merchant would have no knowledge, causing the scale to get off zero, balance, for which he might compensate, by use of the micrometer. I do not think there is any single fixing factor in this scale which may not be altered by the merchant, with the screw-driver, which was offered in evidence here. I think that all the factors in the scale are readily accessible to an honest merchant for the purpose of co-ordinating his scale in its different parts. I would not say it may be likely that a merchant may bring about a wrong co-ordination, but it would be exceedingly liable. I am basing that upon my experience with scales in the stores and their use in stores, because this particular scale of the form of Physical Exhibit A, I have never seen in use in a store. I have seen other scales; some other Standard Computing scales, but never on this particular exhibit, no one exactly like this particular exhibit.

From my examination of this particular exhibit, I think that *is*

is also exceedingly liable to be co-ordinated improperly, in the manner in which you previously asked me.

I will describe the parallex here in this glass. The dealer, in reading the indication on the scale in at least 95 per cent. of the cases, looks simply upon the price values, and never upon the weight. That is because the dealer is concerned with the price of the commodity he is selling, and he is interested primarily in the money he is going to receive. If that were not so, there would not be any reason for making a computing scale, because otherwise he could just as well have his computing chart on the wall, and I make that statement after careful consideration, having visited thousands of stores and making a particular study of the use of scales in all kinds of stores; particularly grocery stores and butcher shops and delicatessen stores, and that is a primary argument used by all scales salesmen, of course. The computing scale should be more carefully considered than an ordinary pointer indicating scale, of whatever type, because the fiducial line on indicating mark, that is on the scale on the dealer's side, cannot be very close to the drum, to the revolving drum. I cannot tell you how far that line is from the drum on this particular exhibit. I have not measured it.

I would not want to make an estimate, except that I know it is a considerable distance. It is in all of them, because when you
104 shift your eye from a position where the eye and the mark are in a horizontal plane, to a position where your line from your eye to a point on the mark is inclined downward, or upward to the horizontal, it produces a considerable apparent shift, which is known as parallex. That parallex exists in every drum computing scale, because mechanically they cannot place it closer, on account of the variations in the drum, and the drum is subject to variation due to climatic conditions, and that is common in all computing scales; and that gives a reason why particular care has to be used in specifications for the examination of computing scales.

Computing scales have their reading mechanism constructed much more delicately than other scales ordinarily used in the retail trade, their reading mechanism, namely the drum, in order to get the money values in most of the scales down to one cent values, have the divisions very much more closely spaced then any—particularly in higher values than in any existing pointer indicating scale, or simple pound and ounce indicating scale, for the reason that the manufacturer is limited to the space that he can put around that drum; in other words, a manufacturer cannot readily make a larger drum for various reasons, largely mechanical reasons. This delicacy in reading to which I have referred, also results from the distance of the reading line from the drum itself. The spaces being very close together, any change or shift in the position of the eye, of course means a considerable error in dollars and cents values; but it is on account of these numerous complications that arise in computing scales, why such care has always been exercised in the specification or regulation of computing scales; simply as a matter of protection to the consumer.

The glass in Physical Exhibit A is a lens used to magnify the divisions on the drum. It is in all computing scales. In some of the computing scales it is continuous, as in the case of the Standard and the Dayton, and some of the others, in some of them it is not continuous, but is interrupted. In my examination of this scale made while I was Superintendent of Weights and Measures, and concerning which I have testified at the trial, the variation in temperature I find produced appreciable error is on the record, on the report. I do not remember off-hand. My off-hand judgment is that an error of about three or four ounces was introduced due to a change of temperature about 20 degrees, three or four ounces in capacity. Three or four ounces in twenty-four pounds. Of course I may mention here that if you had a thirty pound capacity drum, with the same size of drum, the divisions would be even closer.

A three or four ounce error, on the compounded ounce reading device, will also amount to error in the dollars and cents reading device, and the amount of error in cents will depend upon the capacity of the scale, namely, the closeness of the divisions, and upon the price per pound of the commodity that is sold. In my criticism of the defects liable to result, I would confine my criticism mostly to the error resulting in the dollars and cents column, because that is what a computing scale purports to be—an automatic device for determining the total dollar and cents value on a commodity placed on a commodity pan, when sold at a certain price per pound, necessarily it must, otherwise, there would be no object in having computing scales.

105 On Physical Exhibit A the front or back plate covering the support of the spring can be readily removed by taking out two small screws with the wrench and screwdriver, appliance- furnished with the scale.

Coming to the Dayton scale, there is a computing scale in principle, essentially the same as the Standard computing scale. There are minor variations, such for instance, it has a two point bearing platform, whereas the Standard has a four point bearing platform. That style of Dayton scale is not now being sold in this state, (indicating Exhibit). That is not the type that I have seen sold in the last five or six months, unless it be an old one. It is a type that has been approved and sold, there is no question about that, it is a type that has been sold. The essential principle of this scale is the same as the Standard computing scale, and the counter-forced system consists of springs, the springs being moved, actuating a rack, which in turn moves a pinion, which actuates a drum. A slight difference in the nature of the connection of the springs and the rack exists, namely that in this case the end pivots of the lever are moved, thus changing the length of the lever, instead of changing the length of sweep of the rack, as in the case of Physical Exhibit A. Either one of these can be used, however, to accomplish the results, and there is no inherent or essential difference. The one difference in principle of these two scales is that the Dayton scale has an automatic thermostat which due to changes in temperature shifts the position

of the end pivots; whereas the Standard Computing scale is a mechanically operated micrometer screw.

The particular thermostat in the Dayton scale is enclosed in a metal box, being part of the lever system, and it consists of a series of alternating brass and iron strips. As the temperature changes, these strips expand or contract, and as the metals are different and have different co-efficients of expansion, they contract and expand differently, and in doing so cause a shift of a rod, which rod in turn moves the end pivots. Theoretically, there is no reason why the mechanism should not work perfectly. The whole scale is constructed of metal, all parts of which, except the non-essential parts of the glass front and the paper drum, readily conduct heat; in other words, are good conductors of heat; so that the thermostat will in a very few minutes—or should acquire the temperature of the room, as the scale on the springs does—the thermostat should acquire the same temperature of the room within a few minutes. I heard Mr. Osborne's testimony to the effect that it might be several hours. That statement as I understood was based on Mr. Osborne's experiments, and unless I knew the nature of the experiments, I would not like to comment upon it, because naturally, all being a highly conducting material, it would readily all assume the same temperature.

My opinion of the matter is that all parts will quickly acquire the same temperature, because they are highly conducting materials, namely metal, and would all acquire the same temperature in a very few minutes, if the condition of test were the same as the condition of use, namely, if the whole scale were subjected to an approximately uniform change of temperature in the space in which it was placed; to be sure *is* a man put a match under the thermostat, or put a hot wire match in the spring, the two parts of the scale would be exposed to different temperatures, and of course your effects would be different, but of course a scale is not used that way. In this thermostat,

there is no adjustment. It is my opinion that there is no
106 necessity for having the adjustability of the thermostat. If each thermostat is made and tested before it is introduced, there is no necessity for having an adjustable screw. As a matter of fact, an adjustable screw in my opinion would be a defect, because it would give one additional point of adjustment, namely, the one factor which is detrimental to the Standard scale—that has too many factors of adjustment.

The thermostat I have been describing is always a fixed factor in the scale, which cannot be altered without being tampered with or deliberately injured, and that would be obvious to an inspector, and it would be obvious to—yes, I think it would be obvious on inspection. There is no question about it.

The Dayton scale has many points of adjustment, but not as many points of adjustment as the Standard scale. But it has many. If a merchant, by tampering with his scale, should attempt to bring all the parts of adjustment into an incorrect co-ordination, the fixed factor in the thermostat would prevent the scale coming to zero. There is no doubt about it. There is a safeguard, it works automatically. It is a pretty broad statement to say that the only way

a Dayton scale can be brought to zero is by having all the points of adjustment in exact co-ordination with the thermostat. With any mechanism that has so many points of adjustment that would be true; that is true except that of course a person might make all of these adjustments to bring it about, but assuming that one point or two points perhaps were in error, that would be your statement, which would be true, but of course if all of them were thrown out, that is a different proposition, because there would be so many factors which would enter an almost indeterminate proposition. If the points of support of the springs, which is similar in the Dayton scale to the Standard scale, were raised and lowered incorrectly, the scale would not read at zero, and the thermostat is not subject to adjustment to bring it to zero. And when the scale is set up, and tested at the factory, and is properly set up, and tested in the merchant's store at zero, if the scale gets off zero, the inspector would know that it is not the temperature, but that it was error in some other point of adjustment. The merchant would also know that.

If a match or piece of metal was put in the thermostat bar as Mr. Osborne described, and when the inspector came in, it was pulled out, the chances are the scale would be off zero, but he would have some difficulty in pulling it out regularly, if you try and put your hand in among those levers, you will find it is a difficult proposition. Say that he had five minutes to adjust his scale back to zero, if he was a good mechanic, he could, but I have never yet seen the storekeeper that was a good mechanic. Therein lies the danger of having a point of adjustment where he can adjust for error, because the storekeeper is not a mechanic, and he thinks that he can make the adjustment by that screw, and therefore the honest man may be defrauding—see—honestly; if there is such a thing as honestly defrauding. If a scale with an automatic compensating device for temperature is off zero, the high probability is that it is off zero, not because of the change in temperature, but because of the change in some other part of the scale, and any merchant would know that, if your scale is off you will know it, and you will know it is not
the temperature, where there is an automatic compensating
107 device, if he is a reasoning being. Of course I cannot read
the state of mind of the merchant. As a practical matter, this particular compensating device to which I have had a reference on the Dayton scale, those that I have examined, and experimented with in the South, were very efficient; in other words, it compensated for temperature and that is the test of efficiency,—does it do what it purports to do?

This testimony which I have given here is part of or substantially the conversation that I had with Mr. Farrell concerning the promulgation of this rule, after I quit office and when Mr. Farrell had taken office. The same position I hold while I was in the office, which corroborates the letters which were offered in evidence yesterday. Yesterday the point was brought up that it would be easier to manipulate a scale which had a thermostat, than one which would have to be operated by a micrometer screw to shift the point of sup-

port, or shift the rack-rod, as to applying a load on a piece of metal, or anything to the pan, or anything of that kind, of course a man can deliberately defraud with any devices it makes no difference what it is. As a matter of fact any weights and measures official does watch more particularly the fellow who has an elaborate and expensive device to cheat with, and he does cheat with that more effectively than he cheats with a cheaper device. It is only the fool who uses a cheaper scale, and defrauds with it; he generally uses an expensive one. If there was an exhibition of how you could cheat on the Dayton scale, or how you could cheat on the Standard scale, I would be willing to illustrate 100 methods so you could cheat on either one of them. Perhaps you could run it up to 500 methods. I cannot see that that has anything to do with the point of adjustment; in other words, it is not an essential part of the scale, and therefore I do not wish to discuss it.

I wanted to take a serious exception to the statement made yesterday. The scale must be right and have certain requirements, and rules are promulgated by weights and measures officials for the purpose of aiding the inspectors to detect incorrect weighing machines. Those rules are promulgated first, last, and all the time for the protection of the consumer.

I will testify as to the method of using the Dayton scale, and the Standard Computing scale, and other computing scales in retail trades. It was stated yesterday that the dealer always saw the pound and ounce values up first, and then looked at the computing values. My experience covering several years, in which I devoted every day of the year visiting stores, shows that in 95 per cent. of the cases the dealer looks at the computing values, the money values pure and simple.

I have not looked at the Ozias patent sufficiently to be able to give an opinion.

Cross-examination.

By Mr. Smyth:

I have not the least idea who was the President of the Dayton Company. The person of the Dayton Company with whom I have come in contact most recently is Mr. Monaghan, who was their general salesman. Mr. Monaghan I think I met on the street some few months ago. Daniel Monaghan. I know him fairly well, I have known him ever since he was sealer of Weights and Measures in Boston, some eight, or ten or twelve years ago. I did not discuss with him about the testimony I would be called upon to give. I had no idea I was going to give testimony here.

108 I am employed by the Attorney-General's office per diem. That agreement was some time last March or May, some time like that. That was subsequent to the time I was at your office. I remember when I was at your office very well. I remember a conversation I had with you and Mr. Bisgood. I think I remember substantially that conversation I had with you. I do not remember expressing a willingness to testify as an expert for the Standard

Scale Company, because I believe I told you the same thing that I told Mr. Farrell, I rather not testify on either side of the computing scale, because I was against all computing scales.

I said in my letter of March 28, 1914, to Mr. Palmer, "That the requirements of the automatic thermostat on a level cannot be an essential objection as it is one which no honest and fair-minded official has a right to require." That is still my opinion. Referring further to that letter of March 28th, the opinion which I have just expressed, and which I have just now again affirmed, was based upon a scale having the improvements and minor changes which I had suggested before writing the letter. It did not have the improvements I suggested. I remember writing "I regret that I did not see the scale with the improvements and minor changes which I suggested," referring to a period anterior to that. The scale never was shown to me just before I wrote the letter to Mr. Palmer with the minor changes and improvements which I suggested. In my letter I said "I am sorry it was not shown to me." It never was shown to me. I was told by Mr. Palmer that the minor changes which I had suggested had already been embodied in an improved scale, and that he had improved them and I wrote to him I was sorry I had not seen it. There were some mechanical changes that I suggested in the scale. That had absolutely nothing to do with the automatic thermostat.

The automatic thermostat, in my opinion, is not an essential to such scale. I have always maintained that it is not an essential, and I have insisted that scales should be passed without an automatic thermostat, provided the scale was a good one.

By such a device as the Standard scale has, changes in temperature can be taken care of. The mechanical device is an accurate device for taking care of changes in temperature. My objection to the mechanical device is that it may be deliberately used by a dealer for the purpose other than for which it is intended. If a dealer uses it for the purpose for which it is intended, as pointed out to him in the circular Exhibit, in large type, "The only adjustment the scale will require after following the above directions will be the adjustment of the regular dial No. 11 cut A, by using a screw driver. This regulation of the dial will take care of all changes of temperature in your store." There will be no trouble. I don't pretend to say that if a person is to deliberately tamper with an automatic thermostat that a fraud cannot be perpetrated. You can tamper with any scale. You can tamper with any mechanical device, absolutely, with every scale. You can tamper with the Standard mechanical device to perpetrate a fraud. You can tamper with the Dayton automatic device and perpetrate fraud. The Standard scale can get out of order in certain ways. *Braking of* or chipping or breaking the platform.

If that occurs and the scale does not come to zero, there are one or two ways open to the dealer. In the first place he is told
109 that the micrometer device is for temperatures, so if he is honest, he won't touch that. The next place he is told in the circular that if the scale does not weigh correctly, he is to notify the

Company who will see that the same is adjusted. He has to do that unless he knows how to adjust it. There is a way to adjust it very readily, so as to make that weigh correctly in case of break, breaking such a thing as the glass, and it is a similar method in principal as in the Dayton scale. In other words, in defendant's scale it is to adjust the screw 30 in Cut A shown on the instructions so as to move it to zero. If you take that platform of the scale off entirely, I don't know if you can still make the scale weigh honestly by adjusting screw 30 so that it comes back to zero. I don't know whether it would take care of that excessive loan or not. It can be done to take care of such a variation caused by chipping off a piece or cracking it or something of that kind. There is a similar nut, adjusting nut, on the Dayton scale. Another instance of where the Standard scale can get out of order is changing the balance of the drum.

That drum is balanced there, the revolving of the drum. The Dayton scale is balanced in the same way, all of them are. The changing of the balance of the drum would occur by one of the balance weights coming loose or being loosened or removed. If it occurs in that way, a dealer instead of obeying his instructions to get the Company to rectify it, wishes to do it himself, he can still do it with that adjustment 30, on Cut A, and also with the adjustment of the micrometer. Besides the balance of the drum and the breaking of the platform, changing of the rack on the inside, bending of it, would cause inaccuracy. It might occur purposely or be taken out, a man looking at it or bending it or something. That is the only way in which it would be liable to occur by somebody deliberately doing that. That applies also to all and every computing scale in my opinion, to the Dayton scale as well. Change of the weight of the platform is about the only other thing that ordinarily would be likely to occur. By my testimony, we would be substantially limited to accidental interference with the scale and the drum getting out of balance by the balancing weights inside becoming displaced or the platform becoming chipped and the weight lessened. If the scale gets out of balance because it is not on a level, it will produce a small error. A small error, not a considerable one in a scale of that type. That error is provided for by two way levels. It can be put in level by the two way levels that it all.

If by any chance the counter is changed and the scale is shifted the thing that would tell the dealer immediately that something was wrong would be that the thing would not show on zero balance. Looking for the reason it would not be necessary for him to do any adjustment if he looked at his levels, they are in plain sight and seeing that the bubbles were not indicating level, all he would have to do would be to shift his scale until they are level. I assume that is something that he is instructed about in the directions that are sent by the Company.

The shifting of the indicating line could happen accidentally. I have seen that happen, and I imagine it was accidental. If it shifted, it would not necessarily shift equally, one side would not necessarily be as much shifted as the other. If the shift was made,

that would be indicated to the dealer, that would be apparent
110 to the dealer. In that case the dealer could see it was out of order, and it would be improper for him to do anything except to send and have that particular thing which was apparent rectified, if he was honest. That would be the proper thing for him to do. And that would be apparent to any person of ordinary intelligence, that if the line is no longer straight and oblique, that it won't properly show the computations until it is straightened out. If the obliquity were very considerable, it would be apparent. That also would happen in every computing scale.

The deliberate things that I have mentioned as well as the accidental things might as well happen to the Dayton scale as it might to the Standard. To every one of them. And if the mechanical device for overcoming temperature were used in accordance with the directions, and were not deliberately used in violation of the directions, then this mechanical device would not aid in the perpetration of a fraud. That these defects that I mentioned in my direct examination that might occur in a scale such as the Standard or the Dayton, so far as the Standard goes that can all be taken care of properly so as to make the scale—to readjust the scale to an honest basis without recourse to the temperature mechanical device. It is possible to do it. I assume that it probably is so pointed out in the circular of instructions.

I assume that the suggested defect in my letter of January 15th that "The thermostatic head is so devised, that it is not clear to the dealer what the temperature indication is, for instance, it may register 50 degrees, or by giving it one complete turn it may be 150 degrees, yet in each instance 50 shows on the drum" was rectified, in the scale before me, physical Exhibit, which can only be moved now from 30 to 100.

"The adjustment of the suspension of the spring should not be so arranged that it can be readily performed by the dealer." This is an altogether different design of a scale. This design overcomes that objection. "It should be omitted as a field adjustment." That design does not overcome that, because there are specific instructions stating that they should use that wrench to raise and lower that. In other words, the adjustment is in a different place. That criticism was not met, because it still may be a field adjustment. The construction is altogether different. Outside of the thermostat that defect can be met. I should think it can be met, certainly. No reason why it should not be met.

The third objection which I mentioned in my letter that "In the particular scale submitted, there is a mechanical defect in that the end of the long lever adjusting the housing when the thermostat is set at low temperature the back end of the lever is moved out so far that in its descent it touches the edge of the case," that is simply a carelessness in construction in that particular scale. It is also mentioned that the thermostat adjustment should be seen by the customer.

In the thermostat of the Dayton scale, friction in the movement of the thermostat springs might interfere with the accuracy of the

thermostat. If any grit or any dirt or anything got in there accidentally, then the thermostat might not work. Has to be considerable friction, is my judgment. If I remember the bars are rather rigid or are rather of good size. I think if considerable friction were introduced it would not work. Grit and dirt of sufficient quantity would produce sufficient friction to interfere with the ther-
111 mostat. It could be blockaded of course. I never saw rollers put in the thermostat. In the bars that connect with the thermostat, I see that it runs on rollers, that bar. I, personally, do not believe that to be necessary. I would have to experiment on that, however.

The parts are not pressed together by the load that is on the platform. The parts of the rod underneath are pressed by the platform, certainly and that produces some amount of friction. I don't think that would interfere with the working of the thermostat sufficiently. I presume that is what the rollers are there for, to try to overcome that, but a good many people put rollers on something where they don't need it or need them; I am not responsible for their construction. To my knowledge other scales don't use them, don't need them on there, they have not got to counter force—they haven't to overcome the force of the system of springs.

There are a great many other computing scales that have no automatic thermostat, and computing scales with drums. I know of but two kinds actuated by springs: One made out in Kansas City, I don't know whether it is still made or not; and one made in Lancaster, Pennsylvania, that has a spring and lever scale; I don't know whether the one in Kansas City was put on the market, as a matter of fact. I don't know if the one in Lancaster has been refused in the State of New York. I don't know whether it had a thermostat on it or not, that is a spring and lever, that one; I don't know whether it has a thermostat on it or not. When I was in office, they had a scale that did not have a thermostat, but I understand that they do have a thermostat on now, but I do not know. I don't know that it has been refused in the State of New York. As far as I know, there has been no spring and lever computing scale allowed in New York except the Dayton Company. There are scales, there are other scales that compute without a thermostat that are in general use, take for instance the postal department, the parcels post scale which has a capacity of about fifty pounds. They are a computing scale. They have no thermostat on. That is not a combined spring and lever; it has a lever and pendulum scale device. It is a lever and pendulum scale, no spring in them at all.

I know of the ordinary little box or type of scale that computes the postage, for instance the Postal Department, they claim that they do not come within the jurisdiction of any State Weights and Measures officials. They are liable to differ in different temperatures. I think they are the worst scales made. The United States Government says they are all right and uses them without any temperature device. There are temperature devices on spring scales in use in New York City besides the Standard and the Dayton.

It is an automatic device in its action, for instance, the Chatillon

spring scale is an automatic—has an automatic temperature regulation. It is not on that Chatillon scale there. It is not on that type of scale, on that one, but they make a scale—a spring scale which has it. This one is one that was brought out I should think in the neighborhood of two years. I don't know that it is much more recent than two years, within the last eight months. I think Mr. Chatillon spoke to me about — he has made one of those scales even before I was out of office in Albany, but it may be they
112 were not on the market. I suppose that they had a finished product which was put on the market. I am sure I don't know if it was within the last six or eight months he has been bringing them out. He showed me some scales he had made down there with that automatic thermostat device when I was in office. I have never seen one in the trade. His scales were in use in trade without any automatic device to take care of temperature, for years, with the approval of the State as well as the other authorities.

I should say roughly that there are about all told small and large, manufacturers combined, about twenty-five manufacturers making spring scales. I don't know if any of them have a device to take care of changes in temperature except—I know a number of patents have been taken out on them. I don't know whether any of them use them or not.

There is a term in the art of scale manufacturing known as "tolerance." "Tolerance" means the allowable error in the weighing commodities between what is true and what is indicated, because there is no such thing as an absolute accuracy, don't you know, so that the variations allowed are called "tolerance." I don't know what tolerance is allowed in the art in this State. The usual tolerance recognized among authorities varies very considerable. I should say off-hand on a 30 pound scale it might vary anywhere from one-eighth of an ounce, to as high as an ounce allowable error. The amount of tolerance that they allow varies. In some case they won't allow any more than one-eighth of an ounce and in others an ounce. An ounce is the recognized tolerance by the majority, I should say, on spring scales, the majority of them agree to allow an ounce on the capacity of the scale. In spring and lever and spring scales the tolerance is just about the same in all those cases relative to established tolerance. In all the cases where there are established tolerances they vary so, there are so many variations on the different types of scales, that it is pretty hard to keep track of them. I allowed about an ounce when I was State Superintendent, about an ounce on thirty pounds, on spring and lever or spring, either one. I don't know what the City of New York allows. I think they allow two ounces, I am not sure.

Redirect examination.

By Mr. Griffin:

Some time during the year, representatives of the Standard Computing Scale Company, the complainant herein, attempted to retain me as their witness in this litigation. No money was talked about.

I expected to be paid if I had been retained. Some time during the year you asked me to act as your witness. At that time there was no compensation mentioned. I refused to act for the Standard Computing Scale Company. Some time during the year you offered you asked me to act as your witness. I accepted your invitation.

Recross-examination.

By Mr. Smyth:

Mr. Palmer is the person to whom I refused to act as an expert for the Standard Computing Company. I didn't want to get into the computing scale cases at all. I told the State I really would not like to get into it, and as a matter of fact I would go in with the
113 State, if they wanted me to. As a technical witness I am ready to back up any letter that I have written on a construction of any type of scale.

Computations of Mr. Osborne put into the record. Received and marked Exhibit K.

The foregoing statement of evidence is hereby approved and ordered on file.

MANTON,
U. S. District Judge.

Dated, June 13, 1917.

114 CITY AND COUNTY OF NEW YORK, *ss:*

George Tilson of the age of 18 years and upwards, being duly sworn, says That on the 23 day of May, 1917, at 299 Broadway, Borough of Manhattan, New York City, he served the annexed statement of evidence upon Egbert E. Woodbury, Attorney General, atty. for deft., in the within entitled action by leaving a copy of the same during the absence of the said Egbert E. Woodbury from his office, with the clerk of said Egbert E. Woodbury therein.

GEORGE TILSON.

Sworn to before me this 23 day of May, 1917.

[Seal Margaret F. Young, Notary Public, New York County.]

MARGARET F. YOUNG,
Notary Public, 10, *N. Y. Co.*

115 [Endorsed:] 12 E. 147. United States District Court, Southern District of New York. Standard Computing Scale Company, Ltd., Plaintiff, against John F. Farrell, as State Superintendent of Weights and Measures of the State of New York, Defendant.

Statement of Evidence and Notice of Filing.

Wellman, Gooch & Smyth, Solicitors for Complainant, No. 15 Wall Street, New York City. K.

Lodged June 4, 1917. Alex. Gilchrist, Jr. Clerk. Approved and Filed June 13, 1917.

116 COMPLAINANT'S EXHIBIT 1.

New York State Weights and Measures Bulletin.

Published at the Office of the State Superintendent of Weights and Measures, The Capitol, Albany, N. Y.

John F. Farrell,

Superintendent of Weights and Measures of the State of New York.

New Series. August, 1914. No. 2.

A Supplement Accompanies this Number.

Prosecutions for Violation of Provisions of the General Business Law.

Acts or omissions forbidden by law and punishable upon conviction by a fine are misdemeanors. (Penal Law, §2.)

When the performance of any act is forbidden by statute and no penalty is imposed, it is a misdemeanor, and a fine of not more than $500 may be imposed. (Penal Law, §§29, 36.)

For specific penalties the law should be consulted.

Misdemeanors consisting of the violation of a provision of the General Business Law come in the first instance under the exclusive jurisdiction of courts of special session (justices' courts, etc.), except in New York and Albany counties. (Code Crim. Proc., §56.)

When a defendant is fined, the court may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every dollar of the fine. (Code Crim. Proc., §§484, 718.)

Complaint of any violation may be made directly to the court, and a warrant obtained, except violations of §17, in regard to containers. Where there has been a violation of §17 the official should at once notify the Superintendent and he will advise as to the future conduct of the case.

Courts of Special Sessions have power to impose a fine of over $50 for violation of the sections of the General Business Law.

State of New York,

Office of the Attorney-General.

Albany, July 22, 1914.

Hon. John F. Farrell, State Supt. of Weights and Measures, Albany, N. Y.

DEAR SIR: I am in receipt of your communication asking an opinion as to the power of local magistrates to punish violations of the General Business Law.

117 Section 18-*a* of the General Business Law provides that a person violating any of the provisions of §§16, 16-*a*, 16-*b*, 17 and 17-*b* shall be punished by a fine of not less than $25 nor more than $100 for the first and second violations and by a fine of not less than $100 nor more than $500 for subsequent violations.

Section 717 of the Code of Criminal Procedure provides that if the defendant pleads guilty or is convicted, either by the court or by a jury, the court must render judgment thereon of fine or imprisonment, or both, as the case may be, but the fine cannot exceed $50 nor the imprisonment six months.

This section had been in the Code of Criminal Procedure many years before §18-*a* of the General Business Law was enacted. The legislature was aware of the limitations placed upon the powers of the Court of Special Sessions when §18-*a* was passed. It was also aware of the fact that prosecutions for the violation of the provisions of the General Business Law must be commenced by the prosecutor in courts whose powers are thus limited, subject, of course, to the right of the defendant to have the case by proper procedure removed to a higher court. It was apparently the intention of the legislature to empower Courts of Special Sessions to impose the penalties provided for in §18-*a* of the Business Law. It has been the policy of this office, and I think the only sound one that can be adopted, to give force and effect to the substantial provisions of acts of the legislature and leave to courts the question of deciding the validity of statutes.

With this policy in mind and having in mind the plain intention of the legislature in enacting these provisions of the Business Law, I deem it my duty to advise you that prosecutions for violations of these provisions should be started in Courts of Special Sessions, and that the State should insist that these courts have power to impose the full penalty provided for in §18-*a*.

Very truly yours

THOMAS CARMODY,
Attorney-General.

Markings—Metric System.

It is permissible under the law to make bottles, etc., used as containers in terms of the metric system.

State of New York,
Office of the Attorney-General,
Albany.

Quantity Markings on Containers of Imported Brandies and Wines—Metric System Markings Allowed—United States Constitution, Article 1, Section 8—U. S. R. S., Section 3569—New York General Business Law, Sections 2, 5, 17, and 17-*a*.

Bottles and barrels of brandies and wines imported with contents

marked under the metric system may be sold without re-marking in units of the gallon.

118 Statement.

Dealers in brandies and wines often import these commodities in bottles, barrels or other containers whose contents are marked under the metric system.

Inquiry.

The State Superintendent of Weights and Measures wishes to know whether the containers of such commodities must be re-marked in units of the gallon, or whether such commodities may be sold as they are imported, in containers marked under the metric system.

Opinion.

The General Business Law requires the net quantity of containers, such as bottles and barrels, to be marked on the outside thereof or on a ticket attached thereto (§17). Sections 2 and 5 of the General Business Law further provide respectively:

"§2. Description of Weights and Measures.—The standard weights and measures that were furnished to this State by the government of the United States, in accordance with a joint resolution of congress, approved June fourteenth, eighteen hundred and thirty-six and consisting of one standard yard measure and one set of standard weights, comprising one Troy pound, and nine avoirdupois weights of one, two, three, four, five, ten, twenty, twenty-five and fifty pounds respectively; one set of standard Troy ounce weights, divided decimally from ten ounces to the one ten-thousandth of an ounce; one set of standard liquid capacity measures, consisting of one wine gallon of two hundred and thirty-one cubic inches, one-half gallon, one quart, one pint and one-half pint measure; and one standard half bushel, containing one thousand and seventy-five cubic inches and twenty one-hundredths of a cubic inch, according to the inch hereby adopted as standard, and such new weights, measures, balances and other apparatus as may be received from the United States as standard weights, measures, balances and apparatus in addition thereto or in renewal thereof, as well as such weights, measures, balances and apparatus as may be added by the State Department of Weights and Measures and verified by the National Bureau of Standards, shall be the standards of weights and measures throughout this State."

"5. Units of Capacity.—The units or standards of measure of capacity for liquids from which all other measures shall be derived and ascertained shall be the standards designated in this article. The barrel is equal to thirty-one and one half gallons and two barrels are a hogshead. The parts of the liquid gallon shall be derived from the gallon by continual division by the number of two, so as to make half gallons, quarts, pints, half-pints, and gills.

I am informed that the Government of the United States has fur-

nished the State with standards of metric weights and measures. Accordingly such measures are recognized by §2 of the General Business Law above as accepted standards throughout the State. Section 5, while it proceeds to deal with the gallon as the liquid unit, nevertheless at the outset declares that all measures "shall be derived and ascertained" from standards "designated in this article," which, of course, would include any standards referred to in §2.

119

Moreover, it is beyond the power of our legislature to forbid the use of metric system in the sale of any commodities. Article 1, §8, subd. 5, of the Constitution of the United States provides that Congress shall have power:

"5. To coin money, regulate the value thereof, and of foreign coin: and fix the standard of weights and measures."

Pursuant to that power, Congress has enacted Revised Statutes, section 3569 (14 Stat. L. 339):

"It shall be lawful throughout the United States of America to employ the weights and measures of the metric system; and no contract or dealing, or pleading in any court, shall be deemed invalid or liable to objection because the weights or measures expressed or referred to therein are weights or measures of the metric system."

Therefore, as the State must permit the use of the metric system (and has not in my opinion attempted by the General Business Law to prevent it), the importers referred to may mark the contents of their brandy and wine barrels and bottles, or sell them as already marked when imported, in terms of the metric system.

No markings of the quantity contained are required, however, on bottles or barrels containing spirituous beverages until June 1, 1915 (§17-*a* of the General Business Law).

Dated July 15, 1914.

THOMAS CARMODY,
Attorney-General.

To Hon. John F. Farrell, Superintendent of Weights and Measures, Albany, N. Y.

Specifications.

Automatic Computing Scales.

All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance and throughout the whole range of weight graduations.

Wrapped Meats.

State of New York.

Office of the Attorney-General.

Albany.

Wrapped Hams and Bacons—Marking of Net and Gross Weights Required Thereon—General Business Law, Sections 16-18.

Producers of wrapped hams and bacon for sale to the retail customer without unwrapping must mark thereon the net and gross weights.

120 Statement.

Hams and sides of bacon are frequently put up by the producers in paper or cloth coverings, with the object of supplying the consumer with such meat in the best possible sanitary condition. It is contended by the producers of these wrapped hams and bacons that the commodities so wrapped are not in containers, and therefore need not have upon them the net and gross weight markings required under the New York General Business Law. It is the practice, which the producers claim is permissible under the law, to sell the retail customer, when he wishes a whole ham or side of bacon, such ham or bacon, including the weight of the wrapper, which is not removed, at a price per pound for the whole.

Inquiry.

The above contention of the producers having been submitted to the State Superintendent of Weights and Measures, I am asked my opinion by that official, whether wrapped hams and bacons are in container, or, precisely, whether the General Business Law forbids the sale of these commodities to the consumer in the wrappers unless the net weight and the gross weight are marked upon the wrapper or tag attached thereto, so that the purchaser may know, and pay for, the exact quantity of meat he is receiving.

Opinion.

Chapter 81 of the Laws of 1912, which enacted the sections of the General Business Law under consideration, is undisputably a net weight statute. Its very incentive was the prevention of the fraudulent sale to the retail customer of anything but the commodity itself, and full measure thereof, at the asking price per pound, quart or gallon for the commodity.

The law provides two methods of retail sale only; one by weight, measure or numerical count, and the other in container, with such weight and quantity markings on the container as will accurately

advise the buyer of the exact quantity of the product he is purchasing. Sections 16 and 17 of the General Business Law, controlling these two methods of sale, read respectively:

"§ 16. Method of sale of certain commodities.—All meat, meat products and butter, shall be sold or offered for sale by weight. All other commodities not in containers shall be sold or offered for sale by standard weight, standard measure or numerical count, and such weight, measure or count shall be marked on a label or a tag attached thereto; provided, however, that vegetables may be sold by the head or bunch."

"§ 17. Net contents of containers to be indicated on the outside thereof.—When commodities are sold or offered for sale in containers of other sizes than those specified in section sixteen-*a* or whose sizes are not otherwise provided by statute, the net
121 quantity of the contents of each container, or a statement that the specified weight includes the container, the weight of which shall be marked, shall be plainly and conspicuously marked, branded or otherwise indicated on the outside or top thereof or on a label or a tag attached thereto, in terms of weight, measure or numerical count; provided, however, that reasonable variations shall be permitted."

Meats, therefore, must be sold net weight at the time of sale, ascertained by the actual weighing of the commodity by itself, or they must be sold in container, with the net weight computable from the weight markings on the outside thereof. Either these wrapped hams and bacons are in container or they are not. My conclusion is the same, whichever way we view them. This is a net weight statute, not a pure food statute. You cannot, under the law, sell paper or cloth as meat, no matter what sanitary purpose may be served thereby. If such wrapped hams and bacons are in container, the container, by the terms of section 17, cannot be sold as meat; and if they are not in container, there is no more sanction for selling the paper or cloth covering as meat than there is in a sale by container to sell the container as meat.

I am of the opinion, however, that wrapped hams and bacon are in container within the intent of the General Business Law. A container is broadly defined in section 17-*c*;

"'A container' as used in this article, following section fifteen thereof, shall include any carton, box, crate, barrel, half-barrel, hamper, keg, drum, jug, jar, crock, bottle, bag, basket, pail, can wrapper parcel or package. * * *"

I have in mind and I appreciate, that containers are usually of a fixed uniform size and capacity, that this size is entirely artificial, and that the container and its contents are intended to pass directly to the customer without further weighing or measuring. That, on the contrary, the size of the wrappers of hams and bacons is not fixed, and they do not inclose uniform quantities of meat controlled by the producer, but vary, as the natural product itself varies, with the size of the animal slaughtered. And, further, that wrapped hams and bacons are customarily reweighed at the time of sale to

the customer, which is not the case with those commodities usually sold in container.

The above-mentioned custom of the trade to reweigh at the time of sale, the natural diversity in the weight of the products wrapped, and the difficulty of complying with the present provisions, really have nothing to do with the interpretation of the law, which declares that all sales must be by either of two methods, by net weight at the time of sale or net weight in container.

Section 17 also refers to containers as having size, which in a measuring sense means the extent of a thing compared with some fixed standard. In this limited definition, the wrappers on hams and bacons have shape but perhaps no size. Nevertheless they have, I think, relative size, and the word "wrapper," found in the definition of a container in section 17-*c*, is broad enough to include not only a wrapper so made as to contain only a fixed quantity of any commodity, but also a wrapper which adjusts itself to the commodity it contains.

122

Of course, a wrapper such as those around hams and bacons cannot be filled or packed, yet the commodity is "put up" in them, which is the phrase used where the statute makes provision in section 17-*a* that it shall not apply

"to commodities packed, put up or filled prior to eight months after this section takes effect."

The only containers excepted from the operation of the law are such as are mentioned in section 17-*a*, namely, those used for temporarily carrying or delivering the commodity, which is not the case of these wrappers around hams and bacons.

It results that any commodity which is intended to pass in a barrel, box, pail, bottle, can, cloth or paper, from the producer directly to the retail customer without reweighing of the actual contents, is in a container such as the law contemplates shall be marked with the net weight, or the gross weight and the weight of the container, so that the net weight is easily ascertainable at the time of sale.

Careful consideration has been taken of the following authorities, but they have not changed my view with reference to the interpretation of the New York statute. State v. Swift & Company, 120 N. W. 1127, concluded merely that wrapped hams and bacons were not "in package form" under the Nebraska statute. A similar determination was also placed on the words "in package form" in the Federal statute by the United States Department of Agriculture (June 5, 1914). The Attorney-General of Montana likewise has decided that a wrapped ham or bacon is not a "package" (March 3, 1914), and the Attorney-General of California (June 30, 1914), has concluded that a container defined by the California statute as "any receptacle into which a commodity is packed or put for sale" does not include the wrapper around hams and bacons. None of the above authorities have, it seems to me, sufficient force to oust from our statute the explicit word "wrapper" (appearing in our own, but not in their laws) in the definition of the word "container." And, of course, the word "receptacle" used in the California statute, in its

ordinary acceptation, would mean a container previously constructed into which a commodity is placed or received.

All the above opinions are emphatic on the point that wrapped meats are always reweighed at retail sale, and that there can
123 be no fraud in selling wrapped meats gross weight at retail because the customer can always see that the paper or cloth is being placed on the scales along with the meat. This view entirely overlooks the customer who does not appear at the shop, but sends or telephones his order, and does not appreciate that meats in containers are not required, no matter what the custom is, to be reweighed under our statute at the time of retail sale, except in so far as a retailer may do so to protect himself from delivering a net weight less than the variation allowed under the rules of the State Superintendent of Weights and Measures, to which we will presently again refer.

Moreover, the statutes reviewed in the foregoing opinions, as also the Minnesota statute passed upon in State v. Armour & Company, 136 N. W. 565, were expressly aimed at actual deception and fraud in the sale of commodities, which naturally does not occur when the retail purchaser observes the ham being weighed with its covering. The situation is quite different in our State. Intentional fraud or a knowledge or lack of knowledge of any misrepresentation in the sale of commodities has no place as a defense to a violation of the statute (City of New York v. International Provision Company, 144 A. D. 290). The crimes of intentional fraud and misrepresentation are punishable under section 2411 of the Penal Law, which provides that

"a person who injures or defrauds another by using, with knowledge that the same is false, a false weight, measure, or other apparatus, for determining the quantity of any commodity, or article of merchandise, or by knowingly delivering less than the quantity he represents, is guilty of a misdemeanor."

State v. Armour & Company, 145 N. W. 1033, in construing a statute of North Dakota compelling the true net weight to be placed on tin pails containing lard, well marks out the purpose and effect, under the State police power, of net weight statutes like our own:

"The object of all net weight and measure laws is to prevent the opportunity for fraud. It is not material whether defendant in this case was guilty of fraud in the sale of this particular pail of lard; but was the manner of the preparation of the pail such that the people generally might be defrauded? The consumers do not have to depend upon the honesty of the manufacturer in every case. They are entitled to laws allowing them to ascertain the facts themselves. The honest manufacturers, as well as the consumers, are entitled to protection from competition with dishonest weights."

Whether there is actual deception or misrepresentation is, therefore, immaterial under chapter 81 of the Laws of 1912, the
124 net weight and container statute of our State. You cannot sell paper or cloth to the retail customer, be it a container or not, as meat.

Power is conferred upon the State Superintendent of Weights and Measures by section 18 to establish uniform tolerances or amounts of reasonable variation and to make uniform rules and regulations for carrying out the provisions of §§ 16, 17, 17-*a* and 17-*b*. Thereunder the State Superintendent has promulgated Rule 8, providing that:

"Hams, bacon and smoked or cured meat products must be sold by net weight by the retailer to the consumer.

"The wholesaler or packer must sell such meat products by net weight, and on wrapped meat products the wholesaler or packer shall mark the gross and tare weight. This shall be marked so that the tag or label or part thereof which bears the gross indication is removable or detachable, whereas the tag or label or part thereof indicating the tare weight is non-removable or permanently attached to the wrapping or marked upon the wrapping.

"When such products are sold in barrels or packing cases, it will be sufficient to mark the tare on the individual wrapped units in such barrels or packing cases and the gross and the tare on the outside of the barrel or case.

"The lettering shall be at least one-ninth of an inch in height, bold-faced letters. A variation of one and one-half per cent. in weight will be allowed.

"The above regulation will require the retailer, when he keeps the meat in stock for any length of time, to remove the gross weight tag and reweigh and sell by the actual weight delivered to the consumer."

This is a reasonable rule as regards the uniform retail sale of wrapped meats, conforming with the intent of the statute, and is not, therefore, beyond the jurisdiction of the Superintendent of Weights and Measures.

In conclusion, whether the wrapped hams and bacons be considered in container or not, the Superintendent of Weights and Measures has the same power (to assure the purchaser of the net weight he is obtaining) over the retail sale of meat not in containers, as he has over the retail sale of meat in containers, and accordingly, Rule 8, requiring the marking of the tare and gross weights, is applicable in either event.

Wrapped meats, then, may be sold at retail at wrapped net weights, unless the reasonable variation which section 17 allows, the limit of which the State Superintendent has fixed in Rule 8 at one and one-half per cent., is exceeded. This will not frequently occur if the fact be true, as stated by the packers, that wrapped meats do not shrink to a great extent in Northern States, where heat conditions are not severe. If the shrinkage exceeds one and
125 one-half per cent. the net weight should be computed by weighing at the time of sale.

Dated, July 22, 1914.

THOMAS CARMODY,
Attorney-General.

To Hon. John F. Farrell, State Superintendent of Weights and Measures, Albany, N. Y.

It is, therefore, the duty of the Weights and Measures officials throughout the State, under section 18 of the General Business Law, to certify in writing to the State Superintendent any violation by the meat packers. If the facts of each case are sent to the Superintendent he will have the necessary papers prepared and returned to the official for verification, and the matter will then be referred to the Attorney-General for appropriate action.

Containers—Marking of.

Containers of every description must have the gross and tare or the net weight conspicuously marked on the side or top thereof. The State Inspectors report many violations of this law.

Sealers—Duties—Interpretation of Law.

It is not the duty of any local official to pass on questions of law, or to try to interpret the law. Unless such questions have already been definitely passed on by the Department, all such matters should be at once referred to the State Superintendent for opinion.

Bread—Marking—Method of Sale.

Judge Samuel F. Swinburne, of the City Court of New Rochelle, has recently handed down a decision in the cases of three bakers who were arrested and brought before him by John L. MacDonald, sealer of New Rochelle, charged with a violation of section 16 of the General Business Law, in that they had not marked bread sold by them. The bakers contended that they could sell the bread by the count of the loaves, and that, if less than six were sold, no marking was necessary. The decision, which is an important one, follows:

PEOPLE
v.
HEGGEN.

PEOPLE
v.
SCHMIDTMANN.

PEOPLE
v.
HANSEN.

(City Court of New Rochelle, July, 1914.)

SWINBURNE, *J.*:

The defendants were brought into court charged with violating the provisions of §16 of the General Business Law, by offering for

sale certain bread without affixing a statement of the weight of each loaf. The matter is now before me upon demurrer to the information.

126 Section 16, above referred to, provides that commodities must be sold by weight, measure or numerical count. Section 18 of the law directs the State Superintendent, with the assistance of certain other officials, to establish rules for carrying out the law. In accordance with this provision certain regulations have been promulgated, the one referring to bread being as follows:

"(20) Bread.—Bread shall be sold by weight, which shall be marked on the bread or wrapper in bold-face type letters at least one-ninth of an inch in height for bread which weighs one-half pound, one pound, one and one-half pound, two pounds, two and one-half pounds, or three pounds, and in letters at least three-sixteenths or an inch in height for weights other than those above specified. A variation of ten per centum will be allowed."

The word loaf, as applied to bread, carries no meaning of quantity. It designates an individual portion only, the size of which has no relation to the term. In my opinion the section providing for the adoption of regulations was intended to cover cases such as this. Where commodities, such as bread, are in question, the manner of sale is to be regulated by the State Superintendent under section 18 of the law and not by the individual dealer. In no other way can uniformity be obtained and the law be made applicable in its true meaning to the commodity in question.

The demurrers are overruled and the defendants directed to plead to the charge, and for such purpose the cases will be set down for August 5, 1914, at 9 A. M.

Coal; Full Weight Must be Delivered.

State of New York,

Office of the Attorney-General.

Albany, July 14, 1914.

Hon. John F. Farrell, State Superintendent of Weights and Measures, Albany, N. Y.

DEAR SIR: I am in receipt of your favor of the 13th instant.

The provisions of the article of the General Business Law, to which you refer, allowing thirty pounds leeway in the weight of coal, do not, of course, modify the rights or obligations of parties under contracts, and were not so intended. Parties delivering coal, in order to recover therefor, must deliver full weight. The provisions in question were enacted in reference to the enforcement of the penalties provided by the article, and the penalties can not be enforced unless the variation exceeds the amount permitted.

Very truly yours,

THOMAS CARMODY,
Attorney-General,
By J. A. KELLOGG,
First Deputy.

127 Specifications.

Measuring Pumps.

A measuring pump is a device for automatically measuring and discharging predetermined quantities of liquid, or for indicating the amount of such liquid discharged.

All stops or adjusting attachments, when they are such, should be so arranged that they can be sealed by means of wired lead seals in such manner that the stops cannot be changed without breaking the seals. Special fittings to facilitate such sealing are now supplied with pumps by most manufacturers.

The amount delivered shall be correct within the tolerance specified for liquid measures, irrespective of the speed at which the pump is operated, or whether it has been unused for any length of time. As each stop indicates a separate measure, it is important that the seals be always placed as described in paragraph two.

Test a liquid gallon, half gallon, and quart measure in use in the store with the standards, and, having found them correct, seal them. Advise the dealer to keep these sealed measures for future use in inspections. Place a sealed measure underneath the faucet, set the proper stop, and raise the piston as far as it will go, and return. The pump should be operated at a reasonable speed, discharging a full stream of liquid without foaming. If the sealed measure overflows, the stops are not set correctly. If varying results are obtained after adjusting, an inspection of the tank should be made to ascertain that there is sufficient liquid so that no air would be taken in at the suction. Should continued varying results be obtained after such inspection, the apparatus should be condemned for repairs, as the valves or washers are probably worn or leaky, or there is a leak in the pipe line.

When there is present a graduated vessel, either permanently attached or detachable, graduating marks shall extend at least half way around the vessel, so as to eliminate the error due to the relative position of the eye.

Some measuring pumps are adjusted by loosening the nut at the top of the rack and raising or lowering the rack, as may be necessary. On pumps of this type any change of the gallon stop also alters all of the intermediate stops, so the maximum quantity should always be tested first. Then the stops for the smaller measures may be adjusted by loosening the set screws and raising or lowering the stops on the vertical rod. On another variety of pump each stop is independently adjusted.

Special attention must be given to see that no filtering or other device is attached to the discharge pipe or nozzle in such a
128 way as to prevent the delivery of the true quantity measured by the pump.

When a computer or discharge register is attached it must be correct.

129 COMPLAINANT'S EXHIBITS "2" TO "10."

130 COMPLAINANT'S EXHIBIT 2.

June 3, 1915. C. J. H.

One of these must be handed to every dealer visited.

State of New York.

Office of the Superintendent of Weights and Measures.

Jan. 29, 1915.

No. 9030.
Handed to Mr. Geo. B. May.
Firm: Geo. B. May.
Business: Meats.
Street and No. —.
Village: Middleville, Herk. Co.

As a result of inspection on this date your attention is called to the following:

	Correct.	Incorrect.
Wagon Scales	.....	.....
Other Platform Scales	.....	.....
Counter Scales	.....	.....
Spring Scales	.....	.....
The Standard Computing Scales	.....	1—slow and faulty
Weights	.....	.....
Linear Measures	.....	.....
Dry Measures	.....	.....
Liquid Measures	1	.....

Warned to mark out quantities on packages.

Your attention is called to the above and to Article 2 of the General Business Law, and to Sections 2410, 2411, 2412 and 2414*a* of the Penal Law, and to Chapter 81, Laws of 1912.

(Signed) G. F. DASNEY,
Inspector of Weights and Measures.

Time of serving notice 1.15 A. M.

131 COMPLAINANT'S EXHIBIT 3.

June 3, 1915. C. J. H.

45-10450.
Bal. 75,00.
10.00 past due.
L. P. 1/13/15—10.00.
file.
etc.
B.

Ilion, N. Y., 2/6/15.

St. Computing Scale Co., Detroit, Mich.

GENTLEMEN: On January 28th I wrote you concerning your scale, & have received no answer as yet, & have come to the conclusion, either my letter was miscarried or you have not found time to answer it as yet. In that letter I stated that an Inspector of Weights & Measures was here & examined the scale & told me the scale had been condemned in State of N. Y. & marked the slip. (slow & faulty.)

Since then I have taken the scale off the counter and used my "Dayton" altogether. I also wrote in my previous letter that I would defer payment, until I heard from your firm. Now what I wish to know is this, Can I use the scale, lawfully? Will your firm send me a written guarantee saying you will stand back of our firm, should we get into any trouble, through using your scale, with the state of New York? When we purchased your scale we thought, we were buying one, that would stand all tests of inspection of N. Y. Inspectors, in fact your representative told me as much, as I can prove by a witness, of the transaction.

Kindly let me know at once your decision in this matter.

R. F. ACKLER,
36 First St.

132 COMPLAINANT'S EXHIBIT 4.

C. J. H.

Department of Weights and Measures.

No. 84.

Kind of Business: Meat Market.

May 25, 1915.

This is to Certify that, in accordance with the law, I have tested the scales, weights and measures herein enumerated, said to be the

property of (Name) Geo. May (Address) Middleville, N. Y. and have sealed, adjusted or condemned them as set forth below:

	Correct on this date and sealed.	Incorrect on this date and condemned.	Adjusted.
Railroad track scales.	.....	.....	.....
Hopper scales	.....	.....	.....
Wagon scales	.....	.....	.....
Other platform scales.	.....	.....	.....
Counter scales	.....	.....	.....
Spring balances	.....	.....	.....
Beam scales	.....	.....	.....
Computing scales	.....	1—Scale weighs correct but does not comply with N. Y. State Specifications.	.....
Slot personal scales....	.....	.....	.....
Prescription scales ...	.....	.....	.....
Metric scales	.....	.....	.....
Dry measures	.....	.....	.....
Liquid measures	.....	.....	.....
Milk jars	.....	.....	.....
Glass graduates	.....	.....	.....
Automatic gauges	.....	.....	.....
Oil pumps	.....	.....	.....
Metric Measures	.....	.....	.....
Barrels	.....	.....	.....
Baskets	.....	.....	.....
Small fruit baskets...	.....	.....	.....
Boxes	.....	.....	.....
Yard sticks	.....	.....	.....
Counter tacks	.....	.....	.....
Tapes	.....	.....	.....
Metric measures	.....	.....	.....
Avoirdupois weights .	.....	.....	.....
Troy weights	.....	.....	.....
Apothecaries' weights .	.....	.....	.....
Mertic weights	.....	.....	.....
Miscellaneous	.....	.....	.....

HENRY GAFFEY,
Sealer of Weights and Measures.

——— ———,
Deputy Sealer.

133 COMPLAINANT'S EXHIBIT 6.

June 3, 1915. C. J. H.

Middleville, N. Y.,

Jan. 29th, 1915.

Standard Computing Scale Co., Mr. T. F. Comerford.

DEAR SIR: I am writing you to inform you that an agent of the Department of Weights & Measures was at my place this morning and informed me that my use of your scales was a misdemeanor. I showed him the letter I received from you on the 24th ult. and he informed me that he knew nothing of any such action, But that your Company did know that your scales were not legal in New York State at the time you sold them to me. While I like the scales I do not fell as though I can afford to pay $150.00 for a scales that is not conforming with the Laws of the State. Also I feel as though it was up to you to make some provisions for my protection, inasmuch I was an innocent purchaser and was assured by your agent Mr. Hantain that the scales was legal in N. Y. State. Kindly let me hear from you in regard to this matter as I consider that if these scales are not legal and that you can't adjust them so that they will be legal that it is up to you to take the scales back and pay me what money I have al/ready paid and return me the scales that were legal.

Respt.,

GEO. B. MAY.

134 COMPLAINANT'S EXHIBIT 7.

June 3, 1915. C. J. H.

Department of Weights and Measures.

No. 261.

Kind of Business: Grocer.

Dec. 18th, 1913.

This is to Certify that, in accordance with the law, I have tested the scales, weights and measures herein enumerated, said to be the property of (Name) Hayl (Address) Bleeker St. and have sealed, adjusted or condemned them as set forth below:

	Correct on this date and sealed.	Incorrect on this date and condemned.	Adjusted.
Railroad track scales	.....	.....	.....
Hopper scales	.....	.....	.....
Wagon scales	.....	.....	.....

	Correct on this date and sealed.	Incorrect on this date and condemned.	Adjusted.
Other platform scales			
Counter scales			
Spring balances			
Beam scales			
Computing scales	One		
Slot personal scales			
Prescription scales			
Metric scales			
Dry measures			
Liquid measures			
Milk jars			
Glass graduates			
Automatic gauges			
Oil pumps			
Metric Measures			
Barrels			
Baskets			
Small fruit baskets			
Boxes			
Yard sticks			
Counter tacks			
Tapes			
Metric measures			
Avoirdupois weights			
Troy weights			
Apothecaries' weights			
Metric weights			
Miscellaneous			

A. J. REID,
Sealer of Weights and Measures.

——— ———,
Deputy Sealer.

135 COMPLAINANT'S EXHIBIT 8.

June 3, 1915. C. J. H.

10506-3003.

Department of Weights and Measures.

No. 217.

Kind of Business: Grocer.

May 20, 1914.

This is to Certify that, in accordance with the law, I have tested the scales, weights and measures herein enumerated, said to be the

property of (Name) Hayl (Address) Bleecker St. and have sealed, adjusted or condemned them as set forth below:

	Correct on this date and sealed.	Incorrect on this date and condemned.	Adjusted.
Railroad track scales	.....	.....	.....
Hopper scales	.....	.....	.....
Wagon scales	.....	.....	.....
Other platform scales	One	.....	.....
Counter scales	.....	.....	.....
Spring balances	.....	.....	.....
Beam scales	.....	.....	.....
Computing scales	One	.....	One
Slot personal scales	.....	.....	.....
Prescription scales	.....	.....	.....
Metric scales	.....	.....	.....
Dry measures	Three	.....	.....
Liquid measures	One	.....	.....
Milk jars	.....	.....	.....
Glass graduates	.....	.....	.....
Automatic gauges	.....	.....	.....
Oil pumps	.....	.....	.....
Metric Measures	.....	.....	.....
Barrels	.....	.....	.....
Baskets	.....	.....	.....
Small fruit baskets	.....	.....	.....
Boxes	.....	.....	.....
Yard sticks	.....	.....	.....
Counter tacks	.....	.....	.....
Tapes	.....	.....	.....
Metric measures	.....	.....	.....
Avoirdupois weights	Four	.....	.....
Troy weights	.....	.....	.....
Apothecaries' weights	.....	.....	.....
Metric weights	.....	.....	.....
Miscellaneous	.....	.....	.....

A. J. REID,
Sealer of Weights and Measures.

——— ———,
Deputy Sealer.

136 COMPLAINANT'S EXHIBIT 9.

June 3, 1915. C. J. H.

Department of Weights and Measures.

No. 178.

Kind of Business: Grocer.

April 16, 1915.

This is to Certify that, in accordance with the law, I have tested the scales, weights and measures herein enumerated, said to be the property of

(Name) C. Heyle
(Address).....

and have sealed, adjusted or condemned them as set forth:

	Correct on this date and sealed.	Incorrect on this date and condemned.	Adjusted.
Railroad track scales	.....	.....	.....
Hopper scales	.....	.....	.....
Wagon scales	.....	.....	.....
Other platform scales	One	.....	√
Counter scales	.....	.....	.....
Spring balances	.....	.....	.....
Beam scales	.....	.....	.....
Computing scales	.....	One Standard-not approved by State	.....
Slot personal scales	.....	.....	.....
Prescription scales	.....	.....	.....
Dry measures	Four	.....	.....
Liquid measures	Two	.....	.....
Milk jars	.....	.....	.....
Glass graduates	.....	.....	.....
Automatic gauges	.....	.....	.....
Oil pumps	.....	.....	.....
Barrels	.....	.....	.....
Baskets	.....	.....	.....
Small fruit baskets	.....	.....	.....
Boxes	.....	.....	.....
Packages reweighed	.....	.....	.....
Yard sticks	.....	.....	.....
Counter tacks	.....	.....	.....

	Correct on this date and sealed.	Incorrect on this date and condemned.	Adjusted.
Tapes			
Avoirdupois weights	Four		
Troy weights			
Apothecaries' weights			
Miscellaneous			

A. J. REID,
Sealer of Weights and Measures.

____ ____,
Deputy Sealer.

137 COMPLAINANT'S EXHIBIT 10.

June 3, 1915. C. J. H.

Troy, N. Y.,
Mar. 18, 1915.

The Standard Scale Co.

DEAR SIRS: You probably think it strange that I hold back my payments on my scale, but I have had the sealer of weights & measures to my place & he will not seal my scales, for the reason that they will not automatically adjust themselves with the change of atmosphere. I wish to do the fair thing in all of my business & I do not feel that I can afford to lose on them. I am sorry a matter like this has happened. Will you kindly advise me what can be done.

Yours Resp., H. F. FINKLE.

10813
file etc.

Bal. 50,00
20,00 due 2/15—3/15
L. P. 1/21

138 COMPLAINANT'S EXHIBIT "C."

139 PLAINTIFF'S EXHIBIT C.

United States of America,

Department of the Interior,

United States Patent Office.

To all to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the Records of this Office of the Letters Patent of Albert N. Ozias, Assignor to

The Computing Scale Company, Number 648,289, Granted April 24, 1900, for Improvement in Spring-Balance Scales.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 26th day of November, in the year of our Lord, one thousand nine hundred and fifteen and of the Independence of the United States of America the one hundred and fortieth.

(a) (b)

J. T. NEWTON,
Acting Commissioner of Patents.

[(a) Printed form of seal.]
[(b) Printed form of canceled revenue stamp.]

140 2—370.

No. 648,289.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come:

Whereas Albert N. Ozias, of Minneapolis, Minnesota, has presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in Spring-Balance Scales, He having assigned his right, title, and interest, in said improvement, to the Computing Scale Company, of Dayton, Ohio, a description of which intention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided; and

Whereas upon due examination made the said claimant is adjudged to be justly entitled to a patent under the law;

Now therefore these Letters Patent are to grant unto the said The Computing Scale Company, its successors [heirs]* or assigns for the term of seventeen years from the twenty-fourth day of April, one thousand nine hundred, the exclusive right to make, use, and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twenty-fourth day of April, in the year of our Lord one thousand nine hundred and of the Independence of the United States of America the one hundred and twenty-fourth.

[SEAL.]

THOS. RYAN,
First Assistant Secretary of the Interior.

Countersigned:
C. H. DUELL,
Commissioner of Patents.

[*Word enclosed in brackets erased in copy.]

Here follow diagrams,

SPRING-BALANCE SCALES,

PATENT No. 648,289,

Marked pages 141 and 142.

No. 648,289. Patented Apr. 24, 1900.

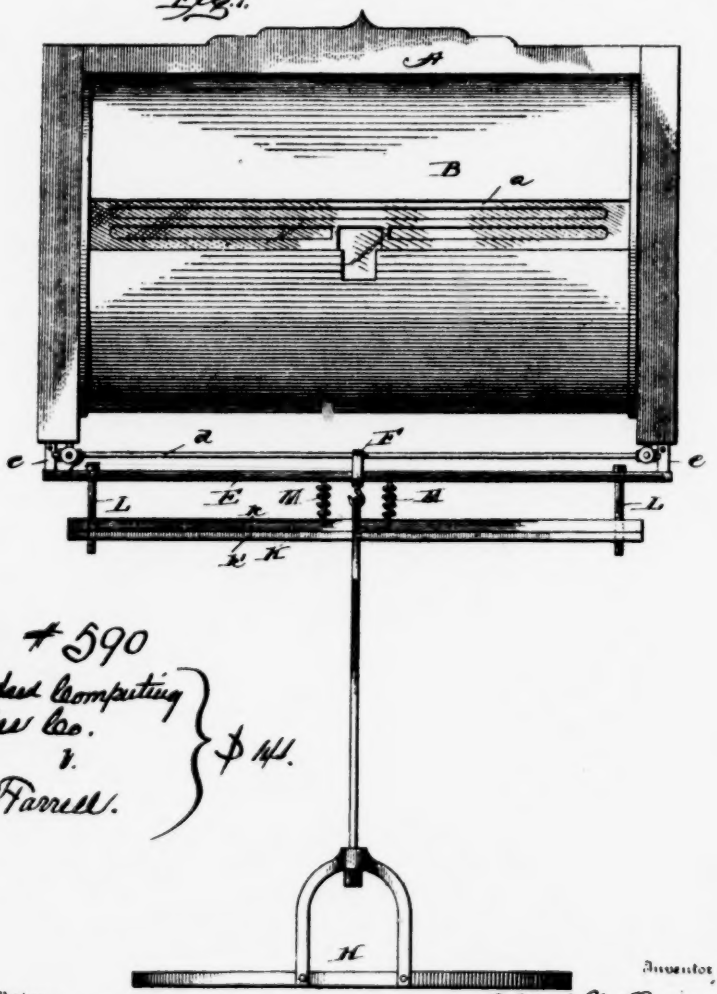
A. N. OZIAS.

SPRING BALANCE SCALE.

(Application filed Nov. 24, 1899.)

(No Model.) 2 Sheets—Sheet 1.

Fig. 1.



#590
Standard Computing Scales Co.
v.
Farrell.
} Ph. Mfg.

Witnesses
J. H. Fowler Jr.
Alex. Stewart

Inventor
Albert N. Ozias
by Church & Church
his Attorneys

No. 648,289. Patented Apr. 24, 1900.

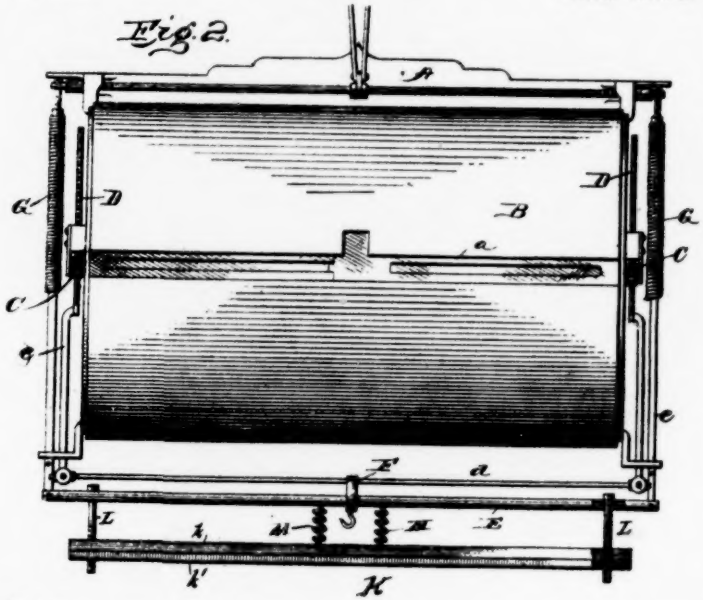
A. N. OZIAS.

SPRING BALANCE SCALE.

(Application filed Nov. 24, 1899.)

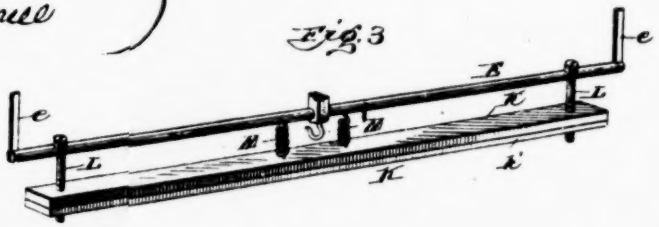
(No Model.) 2 Sheets—Sheet 2.

Fig. 2.



#590
Standard Computing Scales Co.
v.
Fairee
$142

Fig. 3.



Witnesses
J. McGowler Jr.
Alexander Schmidt

Inventor
Albert N. Ozias.
by Church & Church
his Attorneys

143 United States Patent Office.

Albert N. Ozias, of Minneapolis, Minnesota, Assignor to the Computing Scale Company, of Dayton, Ohio.

Spring-Balance Scale.

Specification Forming Part of Letters Patent No. 648,289, Dated April 24, 1900.

Application Filed November 24, 1899. Serial No. 738,223. (No model.)

To all whom it may concern:

Be it known that I, Albert N. Ozias, a citizen of the United States, residing at Minneapolis, in the county of Hennepin and State of Minnesota, have invented certain new and useful Improvements in Spring-Balance Scales; and I do hereby declare the following to be a full, clear, and exact description of the same, reference being had to the accompanying drawings, forming a part of this specification, and to the letters of reference marked thereon.

In scales designed for weighing either in units of weight or in units of value and dependent upon the power of a spring or springs for counterbalancing the weight of the load great difficulty has been experienced in securing accuracy and uniformity in action. The inaccuracy and want of uniformity are due in a large measure to contraction and expansion in the working parts of the scale, and particularly in the springs, occasioned by variations in the temperature of the surrounding air. This is especially so where a coil spring or springs are employed, as in such springs a relatively-long length of wire is necessarily employed, and a slight variation in temperature will cause said wire to expand or contract to a considerable extent. Thus in warm weather the spring is longer than in cold weather, and consequently in warm weather a given load will distort the spring to a greater degree than in cold weather. Mechanical appliances have been employed for permitting of an adjustment to in a measure compensate for variation; but it is the object of my present invention to provide a scale which will automatically adjust itself so as to compensate for and produce uniform results at all temperatures within the range of ordinary atmospheric changes. To accomplish this result, I make use of a thermostatic regulator which will neutralize the differential effective action of the spring due to differences in temperature. Thus the invention may be said to consist, broadly, in the employment, in a spring-balance scale, of a compensating thermostatic device for accomplishing the ends stated; and more specifically the invention may be said to consist in certain novel details of construction and combinations and arrangements of parts, all as will be now described, and the particular features of novelty pointed out in the appended claims.

For illustrating the practical application of the invention I have adopted a form of spring-balance scale which is now in common use,

and embodies a drum adapted to be rotated by the movement of a load-carrier, such movement being resisted by coil-springs, which counterbalance the load-carrier, together with its load, although it will be understood that the invention in its broader aspect is applicable generally to all varieties of spring-balance scales, and hence I do not wish to be limited either to the particular form of scale adopted for illustrative purposes nor to any other particular form of scales.

Referring to the accompanying drawings, Figure 1 is a front elevation of a spring-balance scale embodying my present improvement. Fig. 2 is a similar view with portions of the casing and load-receiver removed. Fig. 3 is a detail perspective view of the compensating thermostatic regulator.

Similar letters of reference in the several figures indicate the same parts.

In the scale illustrated a frame or casing A is provided, adapted to be suspended in any suitable manner, and in which frame or casing there is journaled a drum B, preferably on a horizontal axis and adopted to bear suitable indicating marks or graduations (not shown) which will be exposed through apertures *a* in the casing. The ends of the spindle which support the drum are provided with pinions C, with which mesh rack-bars D, extending down below the casing and connected together by a cross-bar *d*. This cross-bar is preferably somewhat elastic in order to prevent undue shock to the mechanism in starting or coming to rest, and at its center it is connected with a second bar E by means of a block or load-support F. The ends of the bar E are connected with the counterbalancing-springs G preferably through the medium of connecting-rods *e*, whereby the parts are held in their normal position, but may be moved against the tension of said springs by the application of weight to the load-support F. For convenience in the application of the load a load-receiver H is
144 preferably suspended from the load-support F in any approved manner.

In the act of weighing with a scale of this pattern the bar E is acted on by force tending to produce a downward curvature, and this downward curvature will be proportional to the amount of weight placed on the load support or pan, which flexure will be substantially uniform at all temperatures. By providing means whereby when the springs are elongated by the rising temperature the bar E will be stiffened or given an upward flexure in the center, or vice versa, the error due to the variation in the length of the counterbalancing-springs by changes in temperature may be effectually neutralized. For accomplishing this I provide a thermostatic regulator-bar K, in its simplest embodiment composed of metals having different coefficients of expansion—as, for instance, brass *k* and steel *k'*—which thermostat is connected at its opposite ends with the horizontal bar E, preferably by rigid but adjustable connections—such, for instance, as the set-screws L—while at the center a connection is interposed between the thermostat and bar E. This connection is preferably a yielding connection and formed by a coil spring or springs M, interposed between the thermostat and bar E. In the arrangement shown the thermostat is located below the bar E, and the brass or more

highly-expansible metal constitutes the upper portion of the thermostat. Thus when the temperature of the surrounding air rises, thereby causing the counterbalancing-springs to elongate, the tendency of the thermostat is to curve upwardly at the center, thereby tending to give the bar E an upwards flexure, or, what is equivalent thereto, bracing or supporting said bar against downward flexure when the load is applied thereto. Obviously the power of the thermostat must bear some proportion to the power of the springs, and the proportions must be determined empirically for scales of different capacity; but by the provision of adjustable connections between the thermostat and bar E the proportionate strength of the thermostat and counterbalancing-springs may have a wide degree of variation, and by proper adjustment the necessary calibration or sealing of the scale may be effected, so as to secure correct automatic compensation for variations in temperature.

Obviously other forms of thermostatic bars may be employed in lieu of the simple and ordinary type illustrated without departing from the spirit of my invention, and hence I do not wish to be limited specifically to the form shown.

Having thus described my invention, what I claim is—

1. In a scale, the combination with indicating mechanism, a load-support and counterbalancing-springs for the load-support and load carried thereby, of a thermostatic regulator so mounted as to neutralize the variation in the effective action of the springs on the indicator due to changes in temperature of the surrounding atmosphere, but so as to be uninfluenced in such action by the force exerted upon the springs; substantially as described.

2. In a scale, the combination of the following instrumentalities, to wit; an indicating mechanism, a load-support, and counterbalancing-springs for the load-support and load carried thereby, and a thermostatic regulator so mounted as to neutralize the effect of expansion and contraction of the springs on the indicator due to changes in atmospheric temperature, but so as to be uninfluenced in such action by the force exerted upon the springs; substantially as described.

3. In a scale, the combination with an indicating mechanism, a load-support, counterbalancing-springs for the load-support and load carried thereby, and connections between said counterbalancing-springs and indicating mechanism, of a thermostatic regulator coöperating with said connections to neutralize the differential effective action of the spring due to variation in atmospheric temperature; substantially as described.

4. In a scale, the combination with an indicating mechanism, a load-support, a counterbalancing-spring for the load-support and load carried thereby, and connections between said spring and indicating mechanism, embodying a deflectible bar, of a thermostatic regulator for deflecting said bar in opposition to the action of the load; substantially as described.

5. In a scale, the combination of the following instrumentalities, to wit, an indicating mechanism, a load-support, counterbalancing-springs for the load-support and load carried thereby, and a com-

pensating mechanism interposed between the indicating mechanism and counterbalancing-springs and operating in opposition to the variations in the effective action of said springs due to changes in atmospheric temperature, whereby the operation of the indicating mechanism is made uniform at all temperatures; substantially as described.

6. In a scale, the combination with an indicating mechanism, counterbalancing-springs, a hozizontal bar connecting said springs, and connections between said bar and indicating mechanism located centrally of the bar, of a thermostatic regulator for deflecting said bar to compensate for variations in the length of the springs due to changes in atmospheric temperature; substantially as described.

7. In a scale, the combination with an indicating mechanism, counterbalancing-springs, a horizontal bar interposed between said springs, a load-support connected with the center of said bar and connections between said bar and indicating mechanism, of a thermostatic regulator connected with said bar and operating to deflect the same under variations in atmospheric temperature, whereby the effective action of the counterbalancing-springs is made uni-
145 form at different temperatures; substantially as described.

8. In a scale, the combination with an indicating mechanism, counterbalancing-springs, a horizontal bar interposed between said springs and connected centrally with the indicating mechanism, of a thermostatic regulator connected with the opposite ends of said bar and connections interposed between the center of said bar and thermostatic regulator; substantially as described.

9. In a scale, the combination with an indicating mechanism, counterbalancing-springs, a horizontal bar interposed between said springs, connections between the center of said bar and indicating mechanism, and a load-support applied to said bar, of a thermostatic regulator, connections between the ends of said bar and thermostat and centrally arranged springs interposed between said bar and thermostat; substantially as described.

10. In a scale, the combination with an indicating mechanism, counterbalancing-springs, a horizontal bar interposed between said springs, connections between the center of said bar and indicating mechanism and the load-support, of a thermostatic regulator and adjustable connections between said thermostatic regulator and bar; substantially as described.

11. In a scale, the combination with an indicating mechanism, counterbalancing-springs, a horizontal bar interposed between said springs, connections between the center of said bar and indicating mechanism and a load-support, of a thermostatic regulator, adjustable connections between the end of said thermostat and bar and springs interposed between the center of said bar and thermostat; substantially as described. ALBERT N. OZIAS.

Witnesses: SADIE S. RONEY.
E. G. DICKINSON.

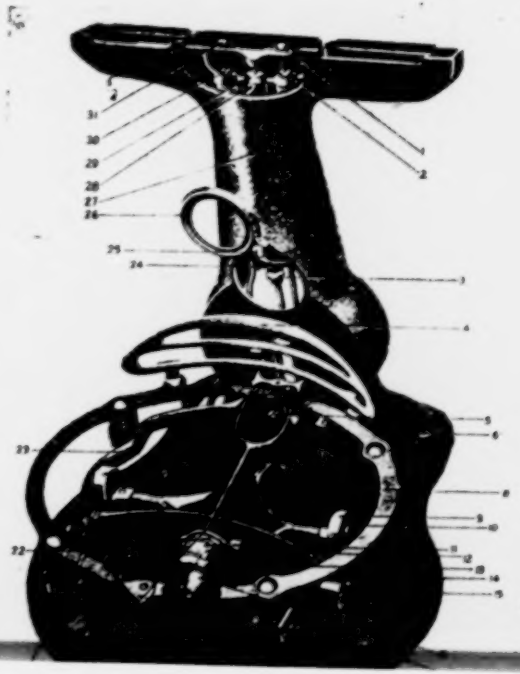
146 COMPLAINANT'S EXHIBITS D, I AND J.

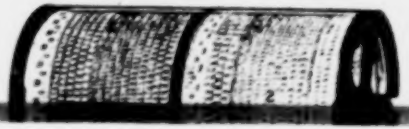
(Here follow diagrams marked pp. 147, 149 and 150.)

Index and Description of Parts

Cut A

1 Spring Bolt.
2 Spring Bolt Lock Nut.
3 Dash Pot Regulator.
4 Guard or Grille.
5 Fulcrum Pin Screw.
6 Leveling Screw Covers (leveling screws beneath cover.)
7 Fulcrum Pin Housing.
8 Platform Frame.
9 Side Loop Caps.
10 Side Loop (two on each scale.)
11 Regulator Dial.
12 Regulator Dial Cover.
13 Regulator Tube.
14 Pivot Cap (six on each scale.)
15 Friction Screw (one in each cap.)
16 Regulator Cap.
17 Lever Stand.
18 Glass Platform Holder.
19 Regulator Cap Screw. This screw must be removed to get access to regulator.
20 Fulcrum Pin. This pin is inside of No. 7.
21 Side Loop Bearing. Bearing is in bottom of side loop. (Two on each scale.)
22 Sub Lever.
23 Lever.
24 Dash Pot Connecting Screw.
25 Column Shutter Screw.
26 Column Shutter.
27 Column.
28 Lock Screw.
29 Adjusting Nut.
30 Spring Bolt Lock Nut.
31 Spring Bolt.





$590.
Standard
6 Scale Co
$147

(Cut B)

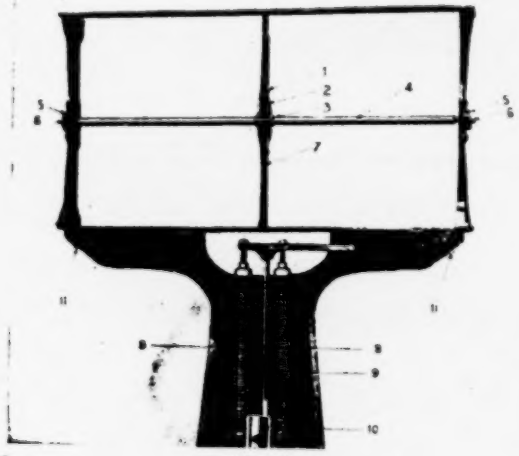
(Cut A)

Cut B

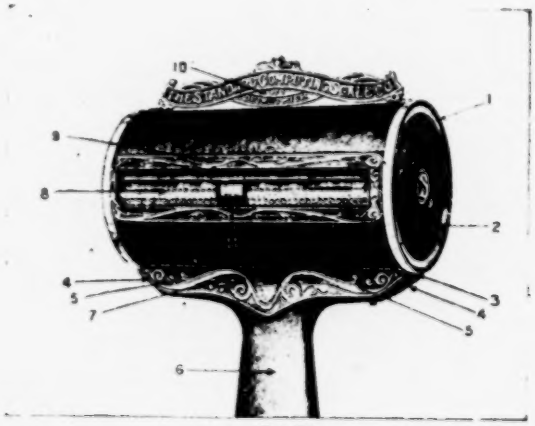
1 Right Hand Dial.
2 Left Hand Dial.
3 Spring Frame.
4 Spring Plug.
5 Springs.
8 Rack Bar.
9 Rack Ball.
10 Dash Pot Regulator.
11 Glass Platform.
12 Dash Pot.
13 Agate Hangers.
14 Base.
15 Rack Carriage.
16 Rack Equalizer.

Cut C

1 Rack Guide Lock Screw.
2 Rack Guide.
3 Pinion.
4 Dial Shaft.
5 Ball Bearing.
6 Ball Bearing Friction Screw and Nut.
7 Center Brace.
8 Springs.
9 Spring Frame Shaft.
10 Rack Ball.
11 Screws for fastening Drum to Column.



(Cut C)

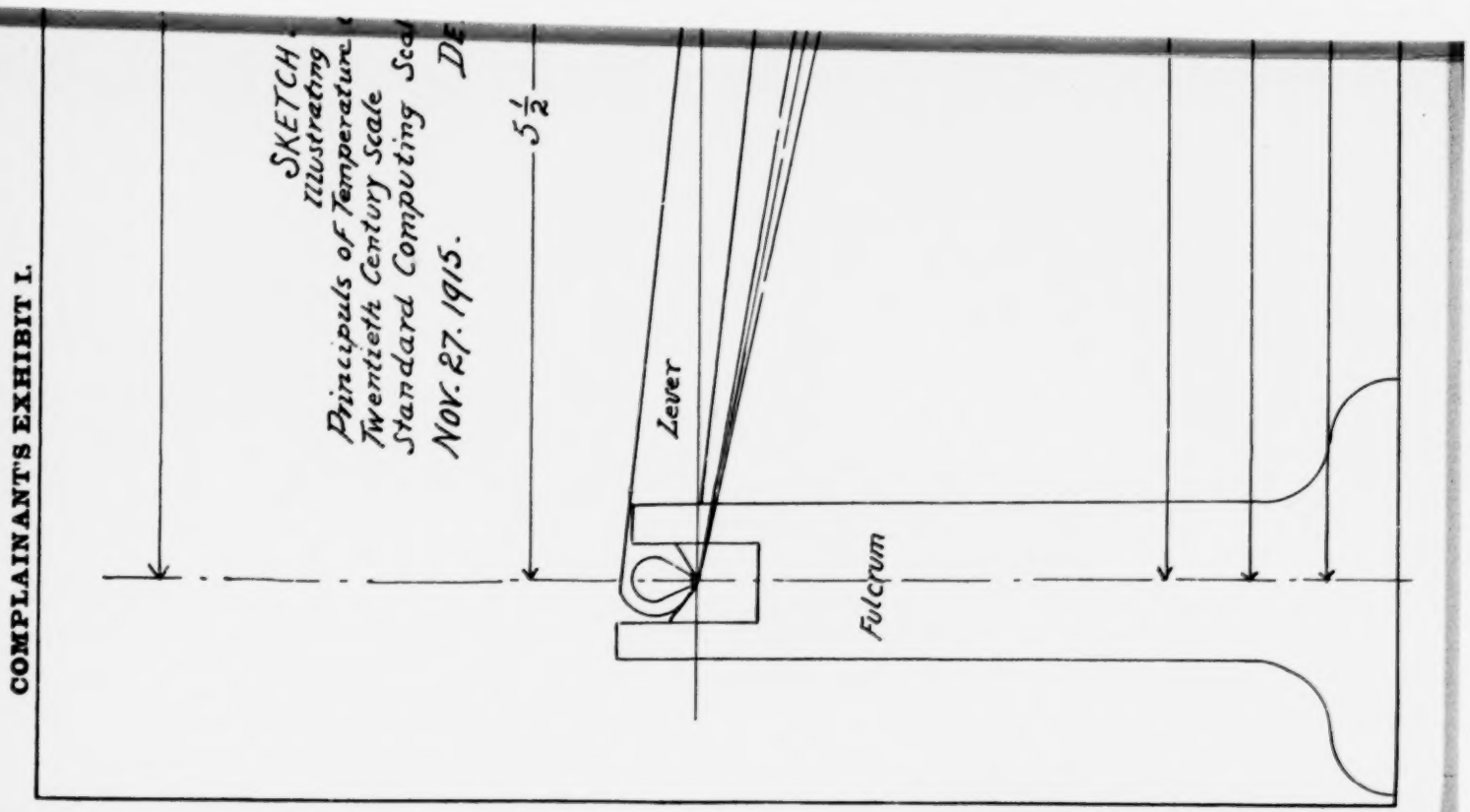


(Cut D)

Cut D

1 Drum Ring.
2 Drum End.
3 Rear Column Ornament.
4 Screws which hold Drum to Column. (Four to each scale.)
5 Screws which fasten Column Ornament to Column. (Four to each scale.)
6 Column.
7 Front Column Ornament.
8 Dial.
9 Reading Frame.
10 Name Plate.
11 Price Per Pound Plate.

Form 44 5m 4-14-16 Matthews Printing Co.



Directions for Setting Up Twentieth Century Scales

AFTER TAKING THE SCALE FROM THE PACKING BOX, REMOVE THE LEATHER WASHERS FROM AGATE BEARINGS, LOCATED ON EITHER SIDE OF THE DASH-POT (Referred to in Cut B, No. 13). To get at these bearings, it will be necessary to remove the circular glass frame at the bottom of the column.

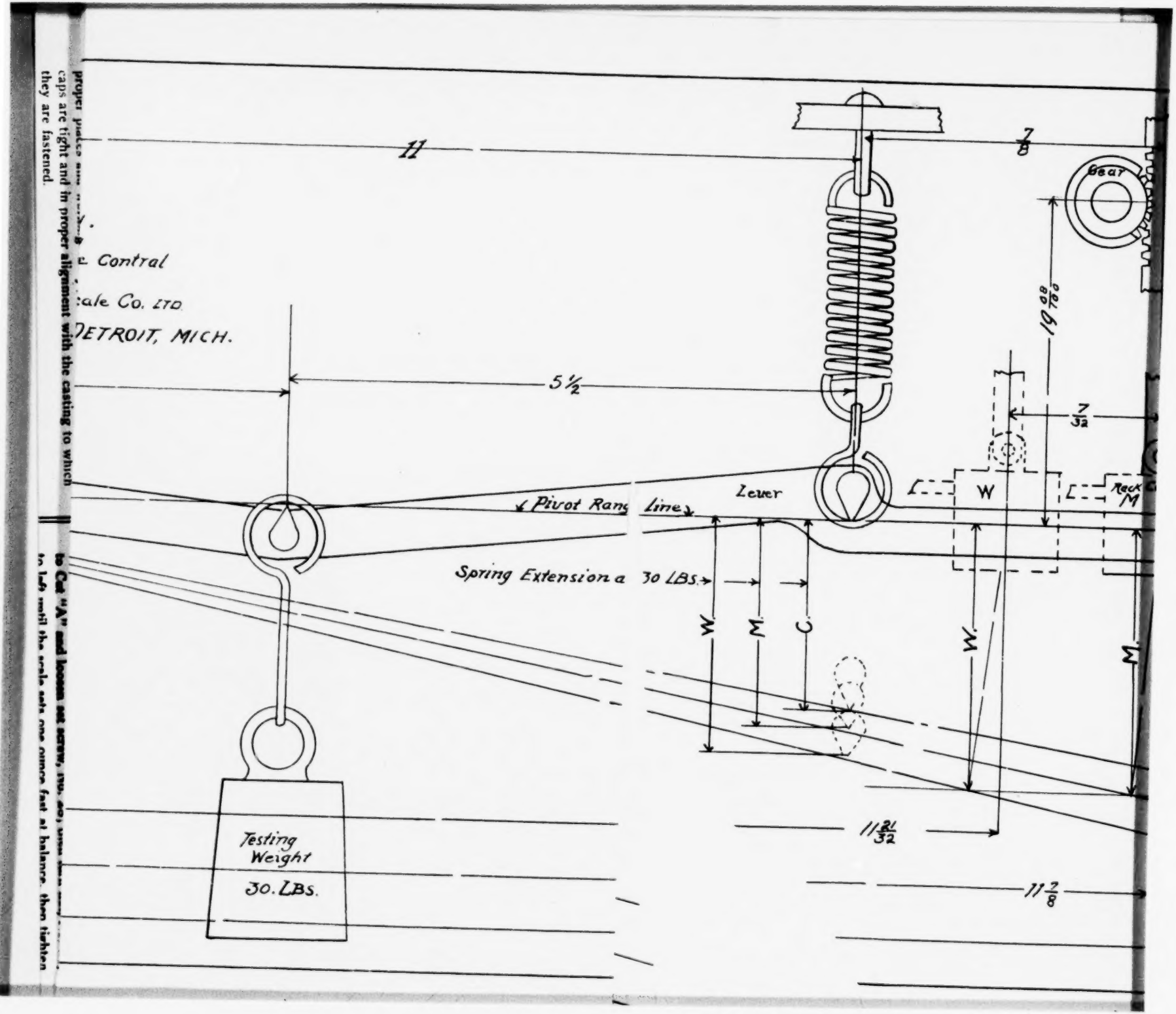
The next thing to do is to connect the dash-pot plunger with the upper part of the yoke. Release No. 3 on Cut A, first reading what the uses of No. 3 are. Then connect the upper part of plunger-stem by means of dash-pot connecting screw referred to as No. 24 on Cut A. Then remove the cap from the dash-pot and see if any of the oil leaked out in shipment. There should be enough oil in the dash-pot to bring the surface within a half inch of the top.

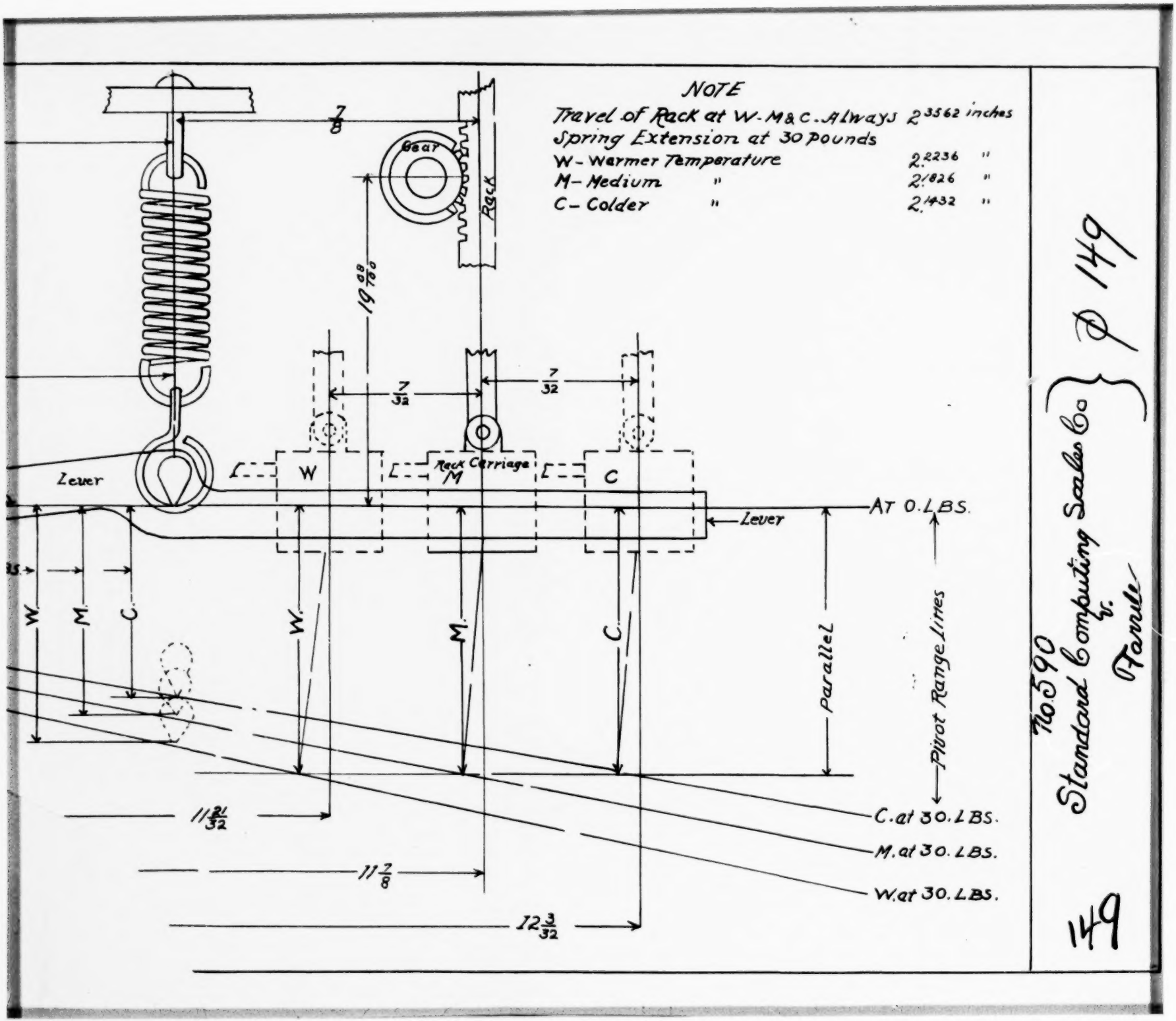
After making dash-pot connection with yoke of scale, then see that all of the bearings in the levers are resting in their proper places and working freely; also see that the brass pivot caps are tight and in proper alignment with the casting to which they are fastened.

After following the foregoing instructions, the next thing to do is to set your scale perfectly level on the counter.

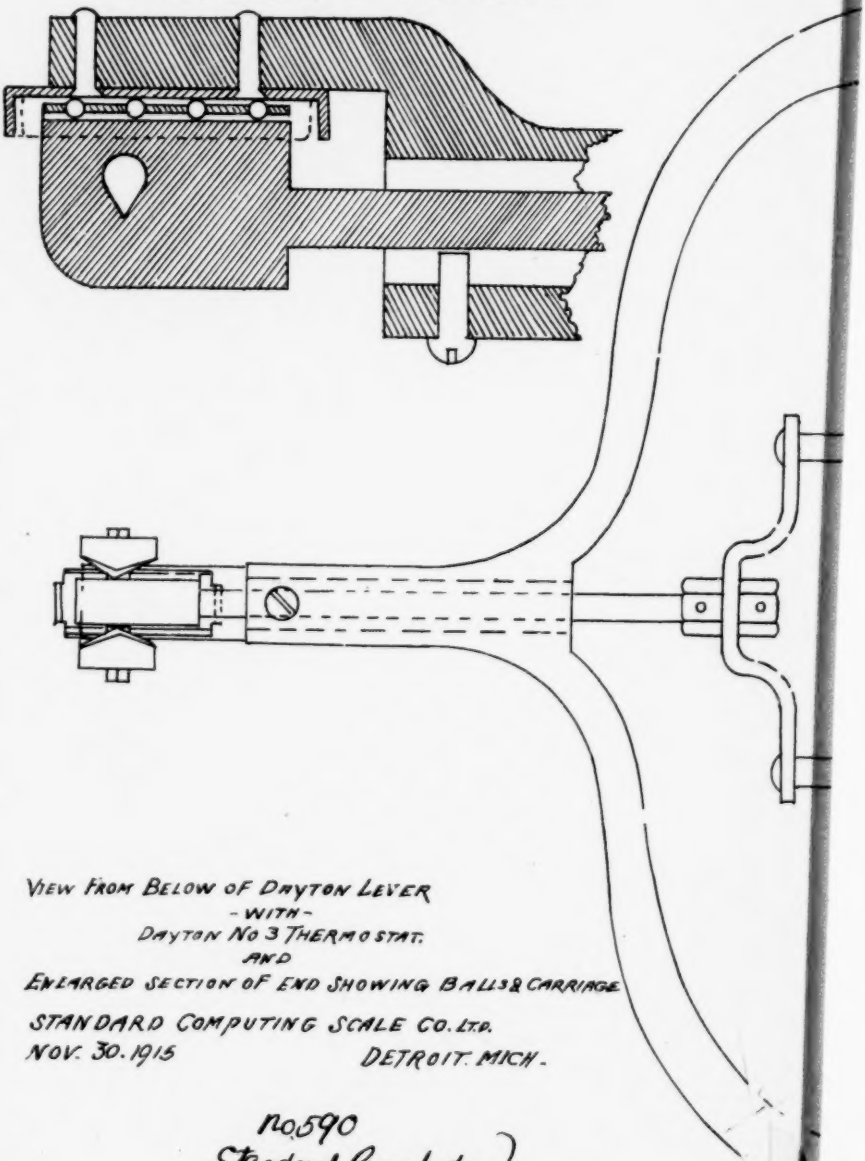
This scale has three leveling feet, and you can level the scale by taking screw driver and raising or lowering one or two of the leveling feet, and in doing so watch the spirit level until both the bubbles are between the marks on the levels.

After you have the scale set perfectly level on the counter, by following the above directions, then press down on the platform four or five times to the full capacity of the scale; then if the scale does not register at zero, remove the Front Column Plate, No. 7, Cut "D," by loosening screw, No. 5, Cut "D." Refer to Cut "A" and loosen set screw, No. 28; then turn nut, No. 29, to left until the scale sets one ounce fast at balance, then tighten


11
7/8
Gear
19 29/64
5 1/2
7/32
Lever
Pivot Rang Line
Spring Extension a 30 LBS.
W
M
C
W
M
11 21/32
11 7/8
Testing Weight
30. LBS.
Contral
Scale Co. LTD
DETROIT, MICH.
caps are tight and in proper alignment with the casting to which
they are fastened.
to Cut "A" and loosen set screw, (No. 66), turn the
to left until the scale sets one ounce fast at balance, then tighten

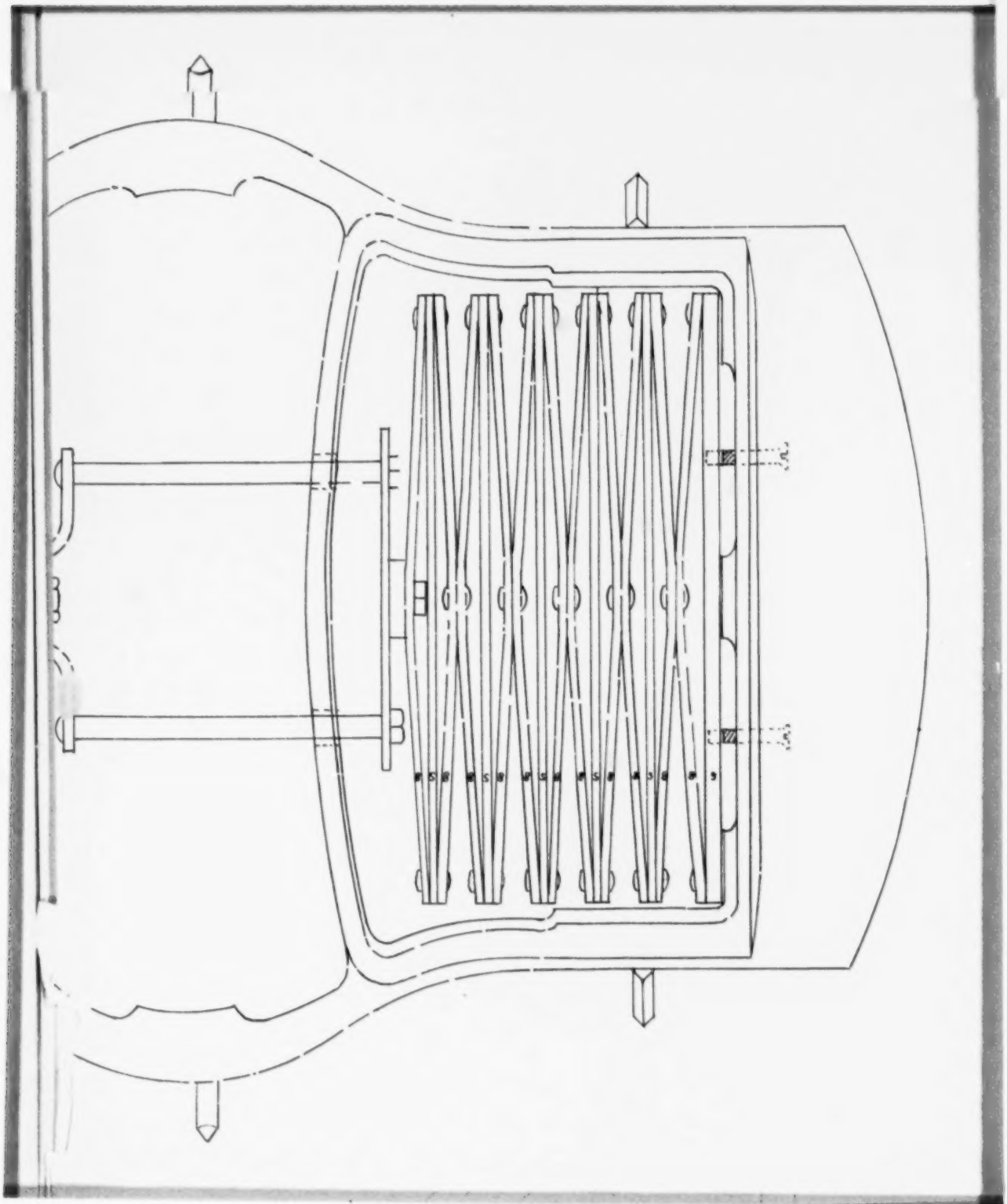

NOTE
Travel of Rack at W-M&C. Always 2.3562 inches
Spring Extension at 30 pounds
W - Warmer Temperature 2.2236 "
M - Medium " 2.1826 "
C - Colder " 2.1432 "
7/8
Gear
Rack
19 08/100
7/32
7/32
Lever
W
Rack Carriage
M
C
AT 0. LBS.
Lever
W.
M.
C.
W.
M.
C.
Parallel
Pivot Range Lines
11 21/32
11 7/8
12 3/32
C. at 30. LBS.
M. at 30. LBS.
W. at 30. LBS.
No 590
Standard Computing Scales Co
Ft. Payne
D 149
149

COMPLAINANT'S EXHIBIT J.



VIEW FROM BELOW OF DAYTON LEVER
- WITH -
DAYTON No 3 THERMOSTAT.
AND
ENLARGED SECTION OF END SHOWING BALLS & CARRIAGE
STANDARD COMPUTING SCALE CO. LTD.
NOV. 30. 1915 DETROIT. MICH.

No. 590
Standard Computing Scales Co.
- v -
Farrell
} P 150



151 COMPLAINANT'S EXHIBITS "E" AND "K."

152 PLAINTIFF'S EXHIBIT "E."

E. 12/147.

Copy.

Albany, N. Y.,
March 28, 1914.

Mr. D. C. V. Palmer, Room 404, #104 Hanover St., Boston, Mass.

MY DEAR MR. PALMER: My resignation has been accepted and my successor has been appointed so that when you submit your scale you will submit it to him. I regret that I did not see the scale with improvements and minor changes which I suggested. The requirements of an automatic thermostat on the lever cannot be an essential objection as it is one which no honest or fair minded official has a right to require. The requirements of such a device would be the limiting the sale to a single patent, which of course is unscrupulous. I have, in my administration of office, always fought any such favoritism.

With best personal regards, and hoping you will have the best of luck, I am

Yours very truly,

F. REICHMANN,
Superintendent.

153 PLAINTIFF'S EXHIBIT "K."

The following tests were made by me in the factory of the Standard Computing Scale Company on the Dayton Scale now on exhibit in this case. And the Standard Computing Scale now on exhibit in this case was subjected to similar tests. These tests were made on November 17th, 18th and 19th. These tests were made to determine whether the automatic thermostat of the Dayton Scale was reliable at different temperatures, and also as to whether it acted positively the same under the same conditions.

First test made on November 17th.

The scales were placed in a room practically open to the weather the night before, and in the morning the room was found to be 36° Fahrenheit.

The Dayton Scale

At zero load showed zero on the indicator.
At 5 lb. load it showed 1 ounce slow.
At 10 lb. load it showed 1 ounce slow.
At 15 lb. load it showed ½ ounce slow.
At 20 lb. load it showed ½ ounce slow.
At 25 lb. load it showed 1 ounce slow.
At 30 lb. load it showed ½ ounce slow.

The Standard Computing Scale, after being set at zero by the temperature regulator, was not more than ½ a line (pound indicating line) out of correct indication.

The scales were then placed in a room 90° temperature. After one half hour they were tested and the Dayton Scale showed the following test:

At zero load it showed 1 ounce fast.
At 5 lb. load it showed 1 ounce plus fast.
At 10 lb. load it showed 1¾ ounces fast.
At 15 lb. load it showed 2¼ ounces plus fast.
154 At 20 lb. load it showed 2 1/3 ounces fast.
At 25 lb. load it showed 2½ ounces fast.
At 30 lb. load it showed 3 ounces fast.

The Standard Computing Scale when set to zero by the temperature regulator showed as before not more than ½ a line (pound indicating line) out of correct indication.

After one hour in the room at 90° temperature the Dayton Scale
At zero load it showed 1 ounce fast.
At 5 lb. load it showed 1 ounce plus fast.
At 10 lb. load it showed 1¾ ounces fast.
At 15 lb. load it showed 2¼ ounces fast.
At 20 lb. load it showed 2 1/3 ounces fast.
At 25 lb. load it showed 2½ ounces fast.
At 30 lb. load it showed 2¾ ounces fast.

The Standard Scale in this test as before showed not more than ½ a line off from correct.

After 1½ hours in the room at 90° the Dayton Scale
At zero load showed ½ ounce fast.
At 5 lb. load it showed ¾ ounces fast.
At 10 lb. load it showed 1¼ ounces fast.
At 15 lb. load it showed 2 ounces fast.
At 20 lb. load it showed 2 ounces minus fast.
At 25 lb. load it showed 2 ounces minus fast.
At 30 lb. load it showed 2 ounces fast.

At the same time the Standard Computing Scale showed not more than ½ line off from correct.

After 2½ hours in the room at 90° the Dayton Scale
At zero load showed zero plus fast.
At 5 lb. load it showed zero plus fast.
At 10 lb. load it showed ¾ ounce fast.
At 15 lb. load it showed 1 ounce fast.
155 At 20 lb. load it showed 1 ounce minus fast.
At 25 lb. load it showed 1 ounce fast.
At 30 lb. load it showed 1 ounce fast.

The Standard Computing Scale in this test showed the same variation as before, and in all of the tests made it showed not more than ½ a line off from correct.

After three hours in the room at 90° the Dayton Scale
At zero load showed ¼ ounce fast.
At 5 lb. load it was correct.
At 10 lb. load it showed ¾ ounce fast.
At 15 lb. load it showed 1 ounce fast.
At 20 lb. load it showed 1 ounce fast.
At 25 lb. load it showed 1 ounce minus fast.
At 30 lb. load it showed 1 ounce minus fast.

After five hours in the room at 90° the Dayton Scale
At zero load showed correct.
At 5 lb. load was correct.
At 10 lb. load it showed ¾ ounce fast.
At 15 lb. load it showed 1 ounce fast.
At 20 lb. load it showed 1 ounce fast.
At 25 lb. load it showed 1 ounce fast.
At 30 lb. load it showed 1 ounce fast.

After six hours in the room at 90° the Dayton Scale
At zero load showed correct.
At 5 load it showed correct.
At 10 lb. load it showed ½ ounce fast.
At 15 lb. load it showed ¾ ounce fast.
At 20 lb. load it showed ¾ ounce fast.
At 25 lb. load it showed ½ ounce fast.
At 30 lb. load it showed ¼ ounce fast.

156 The scales were then placed in a room 72° temperature and after two hours the Dayton Scale
At zero load showed correct.
At 5 lb. load it showed correct.
At 10 lb. load it showed a trifle fast.
At 15 lb. load it showed a trifle fast.
At 20 lb. load it showed correct.
At 25 lb. load it showed correct.
At 30 lb. load it showed ¼ ounce slow.

As before the Standard Computing Scale adjusted by the temperature regulated to zero was practically correct throughout.

The scales were again in a cool room and left over night and in the morning the temperature in this room stood at 53°, and the reading of the Dayton Scale was as follows:
At zero load it was 1/3 ounces fast.
At 5 lb. it showed 5 lbs. plus.
At 10 lb. it showed correct.
At 15 lb. it showed ½ ounce fast.
At 20 lb. it showed ½ ounce fast.
At 25 lb. it showed ¾ ounce fast.
At 30 lb. it showed ¾ ounce fast.

A second trial was made and the following reading taken:
At zero load it showed ¾ ounce fast.
At 5 lb. load it showed ¼ ounce fast.
At 10 lb. load it showed ¼ ounce fast.
At 15 lb. load it showed ½ ounce fast.
At 20 lb. load it showed ¾ ounce fast.
At 25 lb. load it showed one ounce fast.
At 30 lb. load it showed one ounce fast.

157 The Standard Scale showed practically correct as before.
The Dayton Scale was then moved to a room 60° Fahrenheit and after one hour the test reading showed that
At zero load it was ½ ounce fast.
At 5 lb. load it showed ¼ ounce fast.
At 10 lb. load it showed ¼ ounce fast.
At 15 lb. load it showed ½ ounce fast.
At 20 lb. load it showed 2/3 ounce fast.
At 25 lb. load it showed ¾ ounce fast.
At 30 lb. load it showed one ounce fast.

The second reading at this time
At zero load showed ½ ounce fast.
At 5 lb. load it showed correct.
At 10 lb load it showed correct.
At 15 lb. load it showed ¼ ounce fast.
At 20 lb. load it showed ½ ounce fast.
At 25 lb. load it showed ¾ ounce fast.
At 30 lb. load it showed ¾ ounce fast.

After five hours in the room at 60° the Dayton Scale showed practically correct throughout on first test. On second test there was some variation starting ¼ ounce fast at zero load. At other loads it was practically correct.
The third test made at this time at zero load was 2/3 ounce fast and at other weights practically correct.
The scales were then placed in a room at 72° and left for several hours and by moving the evener below the drum of the scale in lateral direction and pulling down upon it at the same time the scale was made to read as follows:
158 At zero load it showed one ounce fast.
At 5 lb. load it showed ½ ounce fast.
At 10 lb. load it showed ¾ ounce fast.
At 15 lb. load it showed ¾ ounce fast.
At 20 lb. load it showed correct.
At 30 lb. load it showed correct.

A second test by moving the evener resulted as follows:
At zero load it showed correct.
At 5 lb. load it showed correct.
At 10 lb. load it showed ½ ounce fast.
At 15 lb. load it showed ⅛ ounce fast.
At 20 lb. load it showed correct.
At 30 lb. load it showed ¼ ounce slow.

These tests show that the Dayton automatic thermostat does not compensate for changes of temperature, and that it does not operate the same under the same conditions.

159 DEFENDANT'S EXHIBIT 1.

160 DEFENDANT'S EXHIBIT No. 1.

E. 12/147.

January 15th, 1914.

The Standard Computing Scale Co., Detroit, Mich. (Attention Mr. D. C. V. Palmer).

DEAR SIR: Test was made on Computing Scale 27382 A, submitted to this office for test. The scale chart is correctly divided in its money values and the scale conforms to time test not showing an appreciable error even if the weight is left on the scale for twelve hours or more. When properly adjusted the scale is correct in its pound and ounce values and in its money values throughout its range.

The scale has several defects:

1st. The thermostatic adjustment is not automatic; is not indicated, and cannot be seen by the customer.

2nd. The thermostatic head is so devised that it is not clear to the dealer what the temperature indication is, for instance, it may register 50° or by giving it one complete turn it may be 150°, yet in each instance 50 shows on the drum. The adjustment of the suspension of the spring should not be so arranged that it
161 can be readily performed by the dealer. It should be omitted as a field adjustment. This adjustment and the opening for making the same should be omitted.

3rd. In the particular scale submitted, there is a mechanical defect in that the end of the long lever adjusts the housing. When the thermostat is set at a low temperature the back end of the lever is moved out so far that in its descent it touches the edge of the case.

Attached hereto are the tables of the tests made.

It is my opinion that this scale should not be used in trade until the defects noted above have been corrected.

Yours very truly,.

——— ———.

Computing Scale submitted by the Standard Computing Scale Co., Ltd., Detroit, Mich. (No. 27382 A).

The capacity is 30 lbs. by ounces. The computing chart is accurate as to its money values.

The scale was placed near the radiator for about fifteen minutes and warmed up to about 85° F. It was then shifted to a cooler part of the room. The thermostat and room temperature both read 70° F.

The following was noted:

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Standard.	Error ascending.	Error descending.
0	0	0
1 lb.	0	
2 "	0	
3 "	0	
4 "	0	
5 "	0	plus ¼ oz.
6 "	plus	
7 "	"	
8 "	plus ¼ oz.	
9 "	" ½ "	
10 "	" ½ "	
11 "	" ¾ "	" 1 "
12 "	" ¾ "	
13 "	" 1 "	
14 "	" 1 "	
15 "	" 1 "	" 1¼ "
16 "	" 1 plus oz.	
17 "	" 1 oz.	
18 "	" 1 plus oz.	
19 "	" 1¼ oz.	
20 "	" 1 "	" 1½ "
25 "	" 1¼ "	
30 "	" 1¾ "	" 1¾ "

A time test was next made. A 30 lb. weight was placed on the scales at 5 P. M. Dec. 19, 1913; reading was plus ½ oz., both thermostat and temperature of room read 70° F. On Dec. 20, 1913, at 8 A. M., the reading was plus ¾ oz.; the thermostat read 70° F. but the temperature of the room had fallen to 63° F. On taking off the 30 lb. the reading was plus ½ oz.; when the thermostat was then turned to 63° F. the scale read plus ¾ oz. Thus the scale conforms to our time test.

163 Another test was made on the morning of Dec. 20th with the temperature of the room and the thermostat reading 63° F.

Standard.	Error.
0	0
1 lb.	0
2 "	0
5 "	0
10 "	0
20 "	0
25 "	0
30 "	0

The scale was then taken to a refrigerating plant, The Hygienic Refrigerating Co., Albany, N. Y. The temperature in the refrigerating room was 2° F. The scale was left in the room for two hours and ten minutes and the reading that time was 1¼ oz. The thermostat was then turned until the weight indication was zero; the thermostat registered plus 5° F. (this was as far as the thermostat would turn). The object of the above test was to determine whether after the scale was adjusted correct to a certain temperature and then shifted to a place of another temperature, the change in the weight indication could properly be taken care of by the thermostat, which if turned until the weight indications registered zero, would itself show the correct temperature of the room. This the scale does.

The scale was tested up to its capacity; the scale acted very slow.

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Standard.	Error ascending.	Error descending.
0	0	plus ¾ oz.
1 lb.	0	
2 "	0	
3 "	0	
4 "	plus ¼ oz.	
5 "	" ¼ "	" 1 oz.
10 "	" ¾ "	" 1 oz.
15 "	" 1 "	" 1¼ oz.
25 "	" 1½ "	" 1¼ oz.
26 "	" 1½ "	
27 "	" 1½ "	
	Indicated.	Indicated.
28 "	27 lb. 5 oz.	
30 "	27 " 5 " Sticks	27 lb. 5 oz.
	plus ¼ oz. Sticks	27 " 5 "

The scale was returned to the office and kept at the temperature of the room over night. The temperature of the room was 67° F. and the thermostat registered 5° F.; the weight reading was plus 2 oz. On turning the thermostat until the weight indication registered zero, the reading of the thermostat showed 67° F. (Temperature of the room.)

Another test (December 23, 1913, at 5:30 P. M.) was then made on the scale as to its accuracy from zero to 30 lbs. and the scale registered accurately.

Another series of tests were then made as to the working of the scale, after manipulating the thermostat and upper adjustment.

1. Temperature of room 60° } Scale registers accurately.
   Thermostat 60° }

2. Temperature of room 60° Thermostat 5° { Reading was plus 1.5 oz. The reading was then made zero by the upper adjustment and a test was made:

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Standard.	Error.
0	0
20 lb.	plus 2½ oz.
25 "	" 3 "
27 "	" 3¼ "
28 "	Read 27 lbs. 11 "
30 "	27 " 13½ "

3. Temperature of room 60° Thermostat 100° Reading was minus 2 oz. The reading was then made zero by the upper adjustment and a test was made:

Standard.	Error.
0	0
10 lbs.	— ¾ oz.
20 "	—1¼ "
25 "	—1½ "
30 "	—2 "

4. Temperature of room 60° Thermostat 160° (Reads as 60°. { Reading was minus 3 oz. This reading was then made zero by the upper adjustment and a test was made:

Standard.	Error.
0	0
20 lbs.	—3 "
30 "	—4¾ "

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5. Temperature of room 60° Thermostat 180° (Reads as 80°.) { Reading was minus 3 oz. This reading was then made zero by the upper adjustment and a test was made:

Standard.	Error.
0	0
20 lbs.	—4 oz.
30 "	—5½ "

In summarizing the results of these tests there are three defects, two of them serious enough to warrant its disapproval by this Department and the others, plain mechanical defects, which can be easily remedied. Of the serious defects, one is the non-automatic

action of the thermostat; where a thermostat is present on a scale; its action should be automatic to protect both the consumer and dealer from any error, intentional or unintentional due to the change of temperature. The other defect is the facility of manipulating the thermostat with the assistance of the upper adjustment. Should the thermostat be set at zero degrees and the weight indicator set at zero by means of the upper adjustment, the scale would read fast on all weights. Should the dealer set the thermostat at 160° or 170° or 180° but the thermostat actually reading 60° or 70° or 80° respectively which temperature conforms to the room temperature, and start the weight indicator at zero he would find it a highly profitable scale on which to purchase from the jobber; thus the dealer could use the scale to his profit whether buying or selling.

The mechanical defect which could be easily overcome is that there is a catch somewhere when the thermostat is set at zero; allowing no reading above 27½ lbs.

167 United States District Court, Southern District of New York.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant,

vs.

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant.

Opinion by Judge Chas. M. Hough.

Filed January 10, 1916.

Final Hearing in Equity.

Herbert C. Smyth for complainant;

The Attorney General of New York (Edward G. Griffin, Deputy Attorney General), for defendants.

HOUGH, *D. J.:*

Mr. Farrell in his capacity as Superintendent of Weights and Measures of this State has promulgated the following rule:

"Automatic Computing Scales.

All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance, and throughout the whole range of weight gradations."

The scale referred to is "spring" because the load of the article to be weighed stretches an elastic (usually a helical coil of steel) which in turn operates an indicator that comes to rest over figures indicative

of weight; it is "lever" because the spring is directly affected by a lever on which the thing weighed proximately operates; it is "combination" because the spring and lever are united in the mechanism; and it is "computing" because the indicator apparatus is so
168 arranged that within the limits of weights and prices for which it is contrived, one glance at a printed card which is part thereof shows e. g. not only that the customer has obtained 9½ lbs. of something, but what he owes for it at 8 cents a pound.

In any contrivance which depends for efficiency upon the elasticity of metal there is an element of error introduced by changes of temperature. In such an apparatus as the scale under consideration a popular description of such capacity for error is to say that the spring "stiffens up" in cold weather and relaxes or loosens in warm weather. When a computing scale ultimately depends for its proper function upon such a spring it is obvious that an erroneous weight produces an increasingly erroneous price, as the amount bought becomes greater.

Even if the percentage of error for all weights within the capacity of the scale remains constant (which is not always the case) most springs will stretch more in proportion for the first few pounds of weight applied to them than for the last pounds for which they are designed. From this it follows that (for example) if a computing scale be designed for weights up to 10 lbs. and prices up to $1 a pound, the lines on the indicator chart will grow closer together as the limit of weight or price or both is approached. Therefore, even with a constant percentage of error through the whole range of operations, the proportionate amount of indicated untruth may grow greater as the weight increases. There are many other reasons why a spring scale or any other scale may develop inaccuracy, beside changes of temperature; upon them it is unnecessary to dwell. There is such a
169 thing as automatic compensation for error induced by temperature variations. The only compensating method shown to the Court is covered by a patent and owned by a scale manufacturing company. Its functions by using the different rate of contraction or expansion of different metals to produce less or more tension upon the weighing spring as the condition of the thermometer may require,—the scale being balanced and adjusted at a given temperature with the compensating metals in known positions.

So far as shown, this method of compensation is accurate but slow; that is to say, it will take perhaps some hours to get a scale which has gone wrong through a drop in the temperature of say 30 degrees, to again become accurate. But it is impossible to prevent the operation of this automatic corrector except by such crude devices as inserting a bar or stick in the scale to prevent its operating at all.

The complainant has no automatic compensation upon its scale, but it has a mechanical compensator. The fact that the scale is no longer true is shown by an examination of the indicator card. If that error is caused by expansion or relaxation of the spring it can be corrected by increasing or diminishing the tension upon that spring by turning a screw. This correction can be made instantly, and in the hands of an honest and even reasonably intelligent owner I see no

reason why complainant's scale is not as good, and more easily corrected, *that* a machine containing an automatic device of the kind above roughly described.

But it is also proven to be true that the same mechanical device with which an honest man will correct complainant's scale for
170 variations caused by temperature, can be easily used by a dishonest or perhaps even an ignorant owner to apparently correct inaccuracies of the scale which have no relation whatever to atmospheric change. The same turn of the same screw which properly produces correspondence between two marks on the indicator face after a sudden drop or rise of temperature will also produce an apparent correctness when the temperature has remained constant but (for example) the spring has suddenly and permanently weakened.

It is therefore true (and this is found to be the basis or reason for defendant's action) that a spring scale without automatic compensation for atmospheric changes is more easily and with less likelihood of detection manipulated against a customer than is a similar scale with automatic protection.

The theory of this bill is simple, and single, viz: That the Superintendent's rule as above quoted is an invalid (i. e. unconstitutional) attempted exercise of the police power, in that it unjustly discriminates between the complainant's scale and the scales of other manufacturers (Sec. 10, Art. 1, U. S. Constitution).

It is alleged also to violate the 14th amendment of said Constitution and to interfere with interstate commerce.

The prayer of the bill puts in a considerable variety of ways the demand that defendant cease to interfere with or prevent "County sealers" from bestowing approbation upon complainant's scales.

What has actually happened is this: There is a considerable body of statute law in New York relating to weights and measures. By that law the offices of County and City "sealers" are estab-
171 lished. These officials are not appointed by the defendant, nor removable by him. They are charged with the duty (inter alia) of examining weights and measures within their cities or counties at stated intervals, and when the same are found to correspond with the State standards the sealers "shall seal and mark such weights and measures with the appropriate devices" (General Business Law, Art. 2, Sec. 15, as amended in 1910).

It is not obligatory upon the defendant to seal anything, though he must at least once in two years visit the various cities and counties of the State (either personally or by deputy) and inspect the work of the local sealers, and in the performance of this duty of inspection "he may inspect the weights, measures, balances or any other weighing or measuring appliances of any person, firm or corporation" (Sec. 11).

But nowhere in the statutes is there to be found any specific authorization conferred upon the State Superintendent permitting him to give definite and detailed instructions to city and county sealers as to what particular form of weighing or measuring device they shall approve or shall disapprove.

It is proven (human nature being what it is) that the official seal

placed by local sealers upon this or that weighing or measuring apparatus is looked upon with great respect by the purchasing community, whether that phrase means the persons who buy scales or those who buy what is weighed. It is a very serious handicap upon, if not almost a complete prohibition of successful selling of any given scale in the State of New York,—that it cannot obtain the approval of the local sealers.

Not all of the City and County officials have recognized
172 the validity of the rule first above quoted, but most of them have done so, and they now refuse to seal any spring and lever computing scale that has not an automatic compensation for changes of temperature. This has become known; plaintiff's sales have fallen off; persons who bought scales on the instalment plan are refusing to pay, and I think it is proven that what was prior to the promulgation of this rule a fair market for plaintiff's scales in this State, has ceased to exist. The object of this suit is by some form of injunctive relief to correct or abolish the rule which has caused this business catastrophe.

Plaintiff is a citizen of Michigan, but at bar jurisdiction was not grounded upon diversity of citizenship, nor does the bill anywhere allege that the amount in controversy "exceeds the sum or value of $3,000 exclusive of interest and costs."

However unusual the foregoing facts may be, and however harsh is the rule which has apparently excluded from the most populous State of the Union one class of scale manufacturers in favor of another class,—I do not perceive that this cause involves any new or uncommon question of constitutional law.

Unconstitutionality is usually tested by an examination of the language of a statute, but sometimes (even if that language be unexceptional) the action or practical application thereof may give rise to an unconstitutionality not inherent in the law but arising from the unjust and extravagant application thereof by the human beings charged with its reasonable enforcement. (Of this the best example is Yick Wo vs. Hopkins, 118 U. S., 356.

173 It is here assumed (even by plaintiff) that the statutes of New York regulating weights and measures and creating and limiting defendant's office are fair upon their face. Let it be assumed (for the purpose of present argument) that these statutes authorize the rule in question. Making such assumption, the question is presented whether the regulation infringes upon any of the constitutional rights of any person.

It is said that the business of making and selling scales is an honest and lawful business; so it is generally speaking; but it is not true that where a subject (as is the case in respect of weights and measures) is historically and essentially subject to government regulation, and indeed is one entirely created by governmental authority,—that any particular style of scale, weight or other instrument of mensuration is entitled either to governmental approbation or to be sold or used at all within the area of that government's sovereignty.

It may be that the present generation will see an adoption by

his country of the metric system. If that were accomplished by legislation it is not doubted that the sale or use of any weight or measure not conformed to the metric system might be pronounced unlawful.

But even if no attention be paid to the peculiar nature of weights and measures in their relation to statute law, it is still true that the legislature may classify those things which it approves and recommends to the citizen and those which it does not; and if such classification is honest, and honestly enforced without personal malice against any particular citizen or class of citizens, the Judges may disagree with the expressed wisdom of the Legislature, but
74 the Court- are without power to interfere. The question is political and not judicial.

Therefore upon the assumption that the rule complained of is authorized by legislation, the final inquiry becomes this: Do the facts here shown furnish any reasonable ground for such a classification of scales as is shown by the rule? In my judgment such reasonable ground is found. It is at least a matter for debate, a question upon which the opinions of equally competent and fair-mined men may differ, as to whether the inherent nature of computing scales is such that automatic compensation should be made a vital test of approval.

It surely needs no citation of authority to prove that, where a discretion is lawfully vested in and honestly exercised by a duly appointed official, for the Courts to interfere therewith is to substitute their own discretion or opinion for that of the officer in whom the same was (in contemplation of law) vested by the electorate or executive appointing power.

It results that (upon the assumption hitherto made) no unconstitutionality is shown in the rule, and the bill should therefore be dismissed.

Whether the action of any given official is unconstitutional is an entirely different question from the query whether it is illegal.

As above set forth, I am clearly of opinion that what Mr. Farrell has done is constitutional on the assumption that it is legal, i. e. warranted by the statutes of this State.

Whether it is legal, that is whether there can be found any statutory authority for the exercise of power that Mr. Farrell has
75 assumed, is in my opinion a very doubtful question. Indeed, if I were asked to interpret as new matter and without the aid of authority the statutes of New York relating to weights and measures and the office of Superintendent thereof, I should strongly incline to the opinion that neither the Superintendent nor the County sealers were authorized to do anything more in respect of scales of any kind than to ascertain whether or not they weighed falsely at the moment of inspection, and if they did weigh false to institute a prosecution and seize the scale as a preliminary thereto; while if they weighed truly when inspected, the sealers should signify that fact by an appropriate certificate,—even if the very man who gave the certificate might be morally convinced that the scale would and could be wilfully falsified the moment his back was turned.

It thus appears that the facts of the case raise this question, viz: whether in this Court at the suit of a citizen of Michigan, an official of the State of New York can be restrained in respect of an exercise of power not inherently wrong nor opposed to any section of the Federal Constitution, but unwarranted by the Statutes of the State. However interesting and curious this point may be, it is thought not to be actually raised in this instance, because:

1. The bill does not ask for any such relief;

2. Now does it show facts necessary to ground jurisdiction on diversity of citizenship;

3. The view of the State statutes above indicated is opposed to the opinion of the Attorney General of the State which is pleaded 176–7 by plaintiff as a correct exposition of the law;

4. Without being bound by the opinion of the Attorney General (as this Court would be by the views of the Court of Appeals) it is entitled to great respect and should not be departed from lightly, nor at all under pleadings such as these; and

5. If it be true (as I incline to think) that Mr. Farrell's action is unwarranted by statute, then he has no discretion, his act is an erroneous ministerial piece of conduct, and the remedy is mandamus and not injunction. Injunction is all this bill asks for; and

6. Mandamus can issue out of the Courts of the United States only as ancillary to a jurisdiction already existing; "in other words, the writ cannot be used to confer a jurisdiction which the (Federal) Court would not have without it." Bath County vs. Amy, 13 Wall., at 249; Rosenbaum vs. Bauer, 120 U. S., at 455.

It follows from these views that the bill must de dismissed.

C. M. HOUGH,
U. S. D. J.

Jan. 8, 1916.

178 *Decree.*

Filed Feb. 8, 1917.

United States District Court, Southern District of New York.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant.

This cause came on to be heard at the December, 1915 term of this Court and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that this suit be, and the same hereby is, dismissed.

Dated, February 7th, 1916.

C. M. HOUGH,
U. S. D. J.

79 [Endorsed:] United States District Court, Southern District of New York.
Standard Computing Scale Company, Limited, Complainant, gainst John F. Farrell, as State Superintendent of Weights and easures of the State of New York, Defendant. Decree.

80 United States District Court, Southern District of New York.

12 Eq. 147.

'ANDARD COMPUTING SCALE COMPANY, LTD., Complainant-appellant,

against

OHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant-appellee.

The above-named complainant Standard Computing Scale Comny, Limited, conceiving itself aggrieved by the decree made and tered in the above-entitled cause and dated on the 7th day of bruary, 1916, whereby it was ordered, adjudged and decreed that mplainant's bill of complaint be dismissed, does hereby appeal to e United States Supreme Court from said decree, for the reasons forth in the assignment of errors which is filed herewith; and it ays that this its petition for an appeal may be allowed, and that transcript of the record, proceedings and papers upon which said der was made, duly authenticated may be sent to the United States preme Court.
Dated, New York, April 2nd, 1917.

WELLMAN, GOOCH & SMYTH,
HERBERT C. SMYTH,
Solicitors for Complainant-appellant.

The foregoing appeal is hereby allowed and bond fixed in the sum Two hundred and fifty dollars, conditioned as the law directs, this d day of April 1917.

JULIUS M. MAYER,
U. S. District Judge for the Southern District of New York.

81 [Endorsed:] United States District Court, Southern District of New York.
Standard Computing Scale Company, Ltd., Complainant-apllant, against John F. Farrell, etc., Defendant-appellee. Petition. Appeal. Filed April 3, 1917.
Wellman, Gooch & Smyth, Solicitors for complainant, 15 Wall reet, New York City.

182 United States District Court, Southern District of New York.

12 Eq. 147.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant-appellant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant-appellee.

And now comes the Standard Computing Scale Company, Limited, the appellant herein, and assigns and sets out separately the following errors, namely:

1. That the United States District Court for the Southern District of New York erred in failing to hold that the promulgation and enforcement of the regulation made by the defendant on or about the 15th day of August, 1914, and reading as follows:

"Automatic Computing Scales.

"All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance and throughout the whole range of weight graduations."

deprived complainant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that said regulation unreasonably, arbitrarily, capriciously and unnecessarily prohibits and prevents the sale by the complainant in the State of New York, of an accurate scale, and thus limits complainant's right to use and enjoy its property, and that such regulation and the limitation of complainant's rights of property thereunder bear no real or substantial relation to the preservation of the public health, safety, morals or welfare; and further, in

183 that defendant, having no power or authority under the statutes of the State of New York to enforce or promulgate said regulation, the taking of complainant's property thereunder is a taking without lawfully constituted authority and, therefore, a taking without due process of law.

2. That said Court erred in failing to hold that the promulgation and enforcement of said regulation by the defendant denies to complainant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, in that said regulation unjustly and unlawfully discriminates against complaintiff's scale by prescribing that spring and lever computing scales which vary with temperature changes, shall be equipped with an automatic device to compensate for such changes, whereas neither said regulation nor any other regulation of the defendant prescribes or attempts to prescribe automatic compensation for temperature

changes in non-computing spring and lever scales, computing spring scales or non-computing spring scales, such non-computing spring and lever scales, computing spring scales and non-computing spring scales being equally susceptible to temperature changes, and that, therefore, said regulation creates an arbitrary classification of scales based upon no proper or reasonable distinction, excluding from its operation numerous other scales similarly situated with complainant's scale.

3. That said Court erred in failing to hold that the promulgation and enforcement of said regulation by the defendant constituted an unlawful restraint of and an unauthorized interference with Interstate Commerce, in that said scales, being manufactured in the State of Michigan, their exclusion from the New York market pre-
184 vents the sale and use in the State of New York of an accurate and innocuous article of trade which is a proper subject of Interstate Commerce.

4. That said Court erred in failing to hold that the promulgation and enforcement of said regulation by the defendant impairs the obligation of contracts in violation of subdivision 1 of section 10 *or* Article 1 of the Constitution of the United States, in that prior to the promulgation of said regulation, complainant had sold scales to purchasers within the State of New York upon conditional sale contracts under which said sale contracts payments were due complainant, and that such regulation, by declaring said scales unlawful, destroys the obligation of said purchasers to pay therefor and defeats complainant's right of action under said contracts.

5. The said Court erred in not making, rendering and entering a final decree in favor of the said complainant and against the defendant, adjudging that the said regulation of the defendant was unconstitutional and void, and granting an injunction against the defendant restraining him from further promulgating, enforcing or attempting to enforce said regulation and from interfering or attempting to interfere with complainant's scales.

6. That said Court erred in dismissing complainant's bill of complaint and entering final decree in favor of the defendant.

Wherefore, the complainant-appellant prays that the decree of the United States District Court for the Southern District of New York, entered on the 7th day of February, 1916, be reversed, and that said United States District Court for the Southern District of New
185 York be instructed to *to* render a proper decree on the record, and that the complainant have its costs and disbursements in this Court and in the Court below.

Dated, New York, April 2nd, 1917.

WELLMAN, GOOCH & SMYTH,
Solicitors for Complainant-appellant.

15 Wall Street, New York City.

186 [Endorsed:] United States District Court, Southern District of New York.

Standard Computing Scale Company, Ltd., Complainant-appellant, against John F. Farrell, etc., Defendant-appellee. Assignment of Errors. Filed April 3, 1917.

Wellman, Gooch & Smyth, Solicitors for complainant, 15 Wall Street, New York City.

187 E. 12. 147.

UNITED STATES OF AMERICA, *ss:*

To John F. Farrell, as State Superintendent of Weights and Measures of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Standard Computing Scale Company, Limited, is appellant, and you are appellee, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, City of New York in the District and Circuit above named this 2nd day of April, in the year of our Lord, one thousand nine hundred and seventeen, and of the independence of the United States the one hundred and forty-first.

JULIUS M. MAYER,
Judge of the District Court of the United States for the Southern District of New York for the Second Circuit.

188 [Endorsed:] United States Supreme Court.

Standard Computing Scale Company, Limited, Complainant-appellant, against John F. Farrell, etc., Defendant-appellee. Citation on Appeal. Filed April 3, 1917.

Copy of within paper received Apr. 3, 1917. Egbert S. Woodbury, Attorney General.

Wellman, Gooch & Smyth, Solicitors for complainant, 15 Wall Street, New York City.

189 Massachusetts Bonding and Insurance Company. Our Bond Your Security.

Massachusetts Bonding and Insurance Company.

Home Office, Boston, Massachusetts.

United States District Court, Southern District of New York.

12 Eq. 147.

STANDARD COMPUTING SCALE COMPANY, LTD., Complainant-appellant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant-appellee.

Known all men by these presents, that the Standard Computing Scale Company, Ltd., as principal, and the Massachusetts Bonding and Insurance Company, a corporation organized under the laws of the State of Massachusetts, having an office and place of business at 84 William Street, in the Borough of Manhattan, City and State of New York, as surety, are held and firmly bound unto John F. Farrell, as State Superintendent of Weights and Measures of the State of New York, in the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars to be paid to the said John F. Farrell, as State Superintendent of Weights and Measures of the State of New York, for the payment of which, well and truly to be made, we bind ourselves, our successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of April, A. D. 1917.

Whereas, the above named complainant, Standard Computing Scale Company, Ltd., conceiving itself aggrieved by the decree made and entered in the above-entitled cause and dated on the 7th day of February, 1916, whereby it was ordered, adjudged and decreed that complainant's bill of complaint be dismissed, has prosecuted an appeal to the United States Supreme Court, from said decree, for the reasons set forth in the assignment of errors which is filed herewith.

Now, therefore, the condition of this obligation is such, That if the above named Standard Computing Scale Company, Ltd., shall prosecute said appeal to effect, and answer all damages and costs, if it fails to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

STANDARD COMPUTING SCALE COMPANY, LTD.,
By THOMAS F. COMERFORD, *President.*
MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By GEORGE E. HAYES,
Assistant Manager.

Attest:
HARVEY SELF,
Resident Secretary.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 3rd day of April, 1917, personally appeared before me Thomas F. Comerford, President of the Standard Computing Scale Company, Ltd., who upon being duly sworn, did depose and say that he executed the above bond for and in behalf of the Standard Computing Scale Company, Ltd., having full authority so to do, and that the said bond is the bond of the Standard Computing Scale Company, Ltd., and is the free act and deed of said corporation.

PETER J. MONAGHAN,
Notary Public, Wayne County, Michigan.

My commission expires Feb. 19, 1919.

190 Massachusetts Bonding and Insurance Company. Our Bond Your Security.

Surety Department.

Justification or Acknowledgement.

Federal Business.

Massachusetts Bonding and Insurance Company.

Home Office, Boston, Massachusetts.

STATE OF NEW YORK,
County of New York, City of New York, ss:

Personally appeared before me Harvey Self on this 3rd day of April one thousand nine hundred and seventeen, known to me to be the Resident Secretary of Massachusetts Bonding and Insurance Company, the Corporation described in and which executed the annexed bond of Standard Computing Scale Company, Ltd. as surety thereon, and who, being by me duly sworn deposes and says that he resides in the city of New York in the State of New York; that he is the Resident Secretary of said Massachusetts Bonding and Insurance Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the Commonwealth of Massachusetts; that said Company has complied with the provisions of the Act of Congress August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Standard Computing Scale Company, Ltd. is the corporate seal of said Massachusetts Bonding and Insurance Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Resident Secretary of said Company; and that he is acquainted with George E. Hayes and knows him to be the Assistant Manager of said Company; and that the signature of said George E. Hayes subscribed to said bond is in the

genuine handwriting of said George E. Hayes and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of One Million and 00/100 ($1,000,000.00) Dollars.

Deponent further says that George B. Covington, residing at New York, in the State of New York, has been duly appointed as the agent of said Company to accept service of process against said Company in the judicial district wherein this bond is given and is authorized to enter an appearance in behalf of said Company in any action, suit, or proceeding brought against it in said judicial district.

HARVEY SELF,
Resident Secretary.

Sworn to, acknowledged before me, and subscribed in my presence this 3rd day of April 1917.

JOHN B. CARPENTER,
Notary Public.

191 [Endorsed:] Approved April 10/17. J. M. Mayer, D. J. Filed April 11/17.

192 At a stated term of the United States District Court, held in and for the Southern District of New York, at the United States Court House and Post Office Building, in the Boruogh of Manhattan, New York City, in said district, on the 19th day of April, 1917.

Present: Hon. Julius H. Mayer, District Judge.

STANDARD COMPUTING SCALE COMPANY LIMITED, Complainant-appellant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant-appellee.

Upon the annexed affidavit of Herbert C. Smyth, verified the 18th day of April, 1917 and the subjoined consent of the solicitors for the parties hereto, it is hereby

Ordered, that the time of the complainant-appellant to docket the case and file the record thereof with the Clerk of the United States Supreme Court be, and the same hereby is, extended from the 2d day of May, 1917, to the 1st day of June, 1917.

J. M. MAYER,
United States District Judge.

We hereby consent to the entry of the foregoing order. Dated, New York, April 18th, 1917.

WELLMAN, GOOCH & SMYTH,
Solicitors for Complt.-appellant.
EGBURT G. WOODBURY,
Atty.-General, Solicitor for Deft.-appellee.

193 United States District Court, Southern District of New York.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, ss:

Herbert C. Smyth, being duly sworn, deposes and says: That he is an attorney and counsellor at law and a member of the bar of this court and one of the solicitors for the complainant in the above-entitled action, and that he has had charge of the case and is familiar with all and singular the matters relating thereto.

That on the 2d day of April, 1917, an appeal was duly taken to the United States Supreme Court from the decree of Honorable Charles M. Hough, dated the 7th day of February, 1916, and that at said time a citation was issued, returnable on the 2d day of May, 1917; that complainant's time to docket the case and file the record in the United States Supreme Court will expire May 2d, 1917 and that it will be impossible for the complainant to so docket its case and file the record by that time, as it will be necessary, under Rule 75 of the Equity Rules of the United States Courts, to reduce all of the testimony in the record, which consists of about 240 pages, to
194 narrative form and file the same with the Clerk, and that, thereafter, the defendant will have ten days within which to suggest amendments or corrections to said statement of the evidence.

Wherefore, deponent asks that the time of the complainant to docket the case and file the record with the Clerk of the United States Supreme Court be extended to the 1st day of June, 1917.

HERBERT C. SMYTH.

Sworn to before me this 18th day of April, 1917.

MARGARET F. YOUNG,
Notary Public, 10, *N. Y. Co.*

195–6 [Endorsed:] County Clerk's Index No. —. Year 191–. United States District Court, Southern District of New York. Standard Computing Scale Company, Ltd., Plaintiff, against John F. Farrell, as State Superintendent of Weights and Measures of the State of New York, Defendant. Affidavit and Order. Filed Ap'l 19-1917.

Wellman, Gooch & Smyth, Attorneys for Complainant, No. 15 Wall Street, New York City.

197 At a Stated Term of the United States District Court, Held in and for the Southern District of New York, at the United States Court-house and Post Office Building, in the Borough of Manhattan, New York City, in said District, on the 31st Day of May, 1917.

Present: Hon. Augustus M. Hand, District Judge.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant-appellant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant-appellee.

Upon the annexed affidavit of Herbert C. Smyth, verified the 28th day of May, 1917, and the subjoined consent of the solicitors for the parties hereto, it is hereby

Ordered, that the time of the complainant-appellant to docket the case and file the record thereof with the Clerk of the United States Supreme Court be, and the same hereby is, extended from the 1st day of June, 1917, to the 1st day of July, 1917.

AUGUSTUS M. HAND,
United States District Judge.

We hereby consent to the entry of the foregoing order.
Dated, New York, May 29, 1917.

WELLMAN, GOOCH & SMYTH,
Solicitor- for Complt.-applt.
MERTON E. LEWIS,
Atty. Genl., State of New York.
EDWARD G. GRIFFIN,
Solicitor for Deft.-appellee.

198 United States District Court, Southern District of New York.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, ss:

Herbert C. Smyth, being duly sworn, deposes and says: That he is an attorney and counsellor at law and a member of the bar of this court and one of the solicitors for the complainant in the above-entitled action, and that he has had charge of the case and is familiar with all and singular the matters relating thereto.

That on the 2nd day of April, 1917, an appeal was duly taken to the United States Supreme Court from the decree of Honorable Charles M. Hough, dated the 7th day of February, 1916, and that at said time a citation was issued, returnable on the 2nd day of May, 1917; that complainant's time to docket the case and file the record in the United States Supreme Court would have expired May 2nd, 1917, but that upon an affidavit of deponent, and upon stipulation of counsel the time to file the record was extended to and including the 1st day of June, 1917.

That the statement of the evidence has been prepared pursuant to Rule 75 of the Equity Rules of the United States Courts, and has been lodged with the Clerk, and that notice of such lodgment
199 has been served upon the solicitor for the defendant, and that the time named in said notice for presenting such statement to the Court for approval is June 4, 1917, and that it will be impossible for the complainant to docket its case and file the record previous to that time.

Wherefore, deponent asks that the time of the complainant to docket the case and file the record in the United States Supreme Court be extended to the first day of July, 1917.

HERBERT C. SMYTH.

Sworn to before me this 28th day of May, 1917.

FREDERICK W. BISGOOD,
Notary Public, 436, *N. Y. Co.*

200–1 [Endorsed:] County Clerk's Index No. 612-147. Year 191–. U. S. District Court, S. D. of N. Y.

Standard Computing Scale Co., Plaintiff, against John F. Farrell, Defendant. Stipulation adjourning return day of citation.

Wellman, Gooch, Smyth, Attorneys for Plff., No. 15 Wall Street, New York City. Filed June 1, 1917.

202–3 *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

12. Equity. 147.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant,
vs.
JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties and as settled by the court.

Dated June 27th, 1917.

WELLMAN, GOOCH & SMYTH,
Attorneys for Complainant.
MERTON E. LEWIS,
Attorney General, State of New York,
Attorney for Defendant.

204 UNITED STATES OF AMERICA,
Southern District of New York, ss:

12. Eq. 147.

STANDARD COMPUTING SCALE COMPANY, LIMITED, Complainant,

vs.

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties and as settled by the court.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 28th day of June in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the said United States the one hundred and forty-first.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

[Endorsed:] U. S. District Court, Southern Dist. of N. Y.
Standard Computing Scale Co., Complt.-appellant, vs. John F. Farrell as State Superintendent of Weights and Measures of the State of New York, Deft.-appellee. Transcript of Record.
Wellman, Gooch & Smyth, Attys. for Complt.-appellant, 15 Wall St., N. Y. City.

Endorsed on cover: File No. 26,057. S. New York D. C. U. S. Term No. 590. Standard Computing Scale Company, Limited, appellant, vs. John F. Farrell, as State superintendent of weights and measures of the State of New York. Filed July 25th, 1917. File No. 26,057.

13.

FILED
FEB 1 1919

Supreme Court of the United States

October Term, 1918, No. 228

STANDARD COMPUTING SCALE COMPANY, LIMITED

Complainant-Appellant

against

JOHN F. FARRELL as State Superintendent of Weights and Measures of the State of New York

Defendant-Appellee

BRIEF FOR STANDARD COMPUTING SCALE COMPANY, LIMITED, APPELLANT

HERBERT C. SMYTH
FREDERIC C. SCOFIELD
FREDERICK W. BISGOOD
Of Counsel

Tel. 1267 Worth THE WEIDEMANN PRINT 38 Elm St., N. Y.
—1919—

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Supreme Court of the United States.

OCTOBER TERM, 1918—No. 228.

STANDARD COMPUTING SCALE COMPANY, LIMITED,

Appellant,
(Complainant below),

v.

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York,

Appellee,
(Defendant below).

BRIEF FOR STANDARD COMPUTING SCALE COMPANY, LIMITED, APPELLANT.

Statement.

This case comes before this Court by appeal from a decree of the United States District Court for the Southern District of New York, denying complainant an injunction restraining defendant from the enforcement of an alleged unconstitutional regulation promulgated by him and affecting a weighing scale manufactured by the complainant.

Complainant is an incorporated partnership association organized and existing under the laws of the State of Michigan. Its business is the manufacture and sale of computing scales.

The principal income of complainant is derived from the manufacture and sale of a combined spring and lever computing scale, known as the Twentieth Century Automatic Computing Scale (referred to hereafter as complainant's scale).

The defendant is the State Superintendent of Weights and Measures of the State of New York. His powers and duties are regulated by Section 11 of the General Business Law of the State of New York, which provides as follows:

> "**Duties of State Superintendent of Weights and Measures.**—The State Superintendent of Weights and Measures shall take charge of the standards adopted by this article as the standards of the State; cause them to be kept in a fire-proof building belonging to the State, from which they shall not be removed, except for repairs or for certification, and take all other necessary precautions for their safe-keeping. He shall maintain the State standards in good order and shall submit them once in ten years to the National Bureau of Standards for certification. He shall correct the standards of the several cities and counties. and, as often as once in five years, compare the same with those in his possession, and where not otherwise provided by law he shall have a general supervision of the weights, measures and measuring and weighing devices of the State, and in use in the State. He shall upon the written request of any citizen, firm, corporation or educational institution of the State, test or calibrate weights, measures, weighing or measuring devices and instruments or apparatus used as standards in the State. He, or his deputies or inspectors by his direction, shall at least once annually test all scales, weights and measures used in checking the receipt or disbursement of supplies in every institution under the jurisdiction of the fiscal Supervisor

of State Charities, and he shall report in writing his findings to said fiscal Supervisor and to the executive office of the institution concerned; and at the request of said officers the Superintendent of weights and measures shall appoint in writing one or more employees, then in actual service, of each institution, who shall act as special deputies for the purpose of checking the receipt or disbursement of supplies. He shall keep a complete record of the standards, balances and other apparatus belonging to the State and take receipt for the same from his successor in office. He shall annually during the first two weeks of January make to the Legislature a report of the work done by his office. The State Superintendent, or his deputies or inspectors by his direction, shall inspect all standards used by the counties or cities at least once in two years and shall keep a record of the same. He or his deputies or inspectors at his direction, shall at least once in two years visit the various cities and counties of the State in order to inspect the work of the local sealers and in the performance of such duties he may inspect the weights, measures, balances or any other weighing or measuring appliances of any person, firm or corporation."

The General Business Law of the State of New York also provides for County Sealers and City Sealers of Weights and Measures in the various counties and cities of the State:

"Section 13. **County Sealer; Duties of County Sealer; Duties of Supervisors.**— There shall be a county sealer of weights and measures in each county, who shall be appointed by the board of supervisors and hold office during the pleasure of such board. He shall be paid a salary determined by the board of supervisors and shall be provided by them with the necessary working equipment of standard weights and measures. He shall take charge of and safely keep the county

standards. Where not otherwise provided by law the county sealer shall have the power within his county to inspect, test, try and ascertain if they are correct, all weights, scales, beams, measures of every kind, instruments or mechanical devices for measurement and the tools, appliances or accessories connected with any or all such instruments or measurements used or employed within the county by any proprietor, agent, lessee, or employee in determining the size, quality, extent, area or measurement or quantities, things, produce, articles for distribution or consumption offered or submitted by such person or persons for sale, for hire or award. He shall at least twice in each year and as much oftener as he may deem necessary see that the weights, measures and all apparatus used in the county are correct. He may for the purposes above mentioned, and in the general performance of his official duties, enter or go into or upon and without formal warrant, any stand, place, building or premises or may stop any vendor, peddler, junk dealer, coal wagon, ice wagon or any dealer whatsoever, for the purposes of making the proper tests. Whenever the county sealer finds a violation of the statutes relating to weights and measures he shall cause the violator to be prosecuted. The county sealer shall keep a complete record of the work done by him and shall make an annual report to his board of supervisors, and an annual report, duly sworn to, not later than the first of December, to the State Superintendent of weights and measures. The county sealer of weights and measures shall forthwith on his appointment give a bond, with sureties to be approved by the appointing power, for the faithful performance of the duties of his office and for the safety of the local standards and such appliances for verification as are committed to his charge and for the surrender thereof immediately to his successor in office or to the person appointed by the proper authority to receive them.

"Sec. 14. **City Sealer.**—There shall be a city sealer of weights and measures to be appointed by the mayor with the approval of the common council of each city. He shall be paid a salary to be fixed and determined by the board or body authorized to determine salaries of city officials, and no fees shall be charged or received by him or by the city for the inspection or testing of weights, measures or weighing or measuring devices. He shall perform in his city the duties of and have like powers as a county sealer in a county. This section shall not apply to the City of New York.

"Sec. 15.—**Weights and Measures to be Sealed.**—Whenever the Sealer of a city or county compares weights and measures and finds that they correspond or causes them to correspond with the standards in his possession, he shall seal and mark such weights and measures with the appropriate devices."

About the middle of August, 1914, the defendant mailed to every county sealer and city sealer in the State of New York whose powers were not regulated by special enactment of the Legislature, a pamphlet containing a regulation for the guidance of these sealers in the performance of their duties. The regulation reads as follows:

"Automatic Computing Scales.—All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes in temperature at zero balance and throughout the whole range of weight gradations" (p. 5).

Complainant's scale is concededly a combination spring and lever computing scale, and so falls within the classification which the regulation is intended to affect (p. 12).

At the time of the promulgation and circulation of the regulation by defendant, complainant had

been selling scales in New York for about sixteen months. During that time 206 scales had been sold in that State, an average of 13 scales per month. A "pretty good" trade had been worked up, yielding a fair profit (pp. 46, 47).

Prior to the promulgation of the regulation by defendant, the various county and city sealers had sealed the scales of complainant which they found in use in their respective jurisdictions. Since the regulation, such sealers have neglected to seal complainant's scales and have warned the scale users to discontinue the use thereof. In addition, defendant's inspectors have visited persons using complainant's scales and have left slips describing such scales as slow and faulty (pp. 24, 101).

The natural consequences of these various activities of local and State scale officials since the regulation followed, as anticipated.

From August, 1914, to December, 1915, complainant sold 49 scales, an average of about three per month. For the twelve months immediately preceding the trial of this action, the complainant sold a total of 10 scales, less than one scale per month. Purchasers of the scales have written letters to complainant demanding repayment of the purchase price of scales. Most of the scales are sold on the instalment plan and payments have been deferred or discontinued, so that, upon sales made before the regulation went into effect, the complainant has sustained a loss. The greatest injury to complainant probably arises because of the unfavorable publicity which the scales have received from dissatisfied customers, sealers and competing companies (p. 46).

The complainant brought its bill of complaint to restrain the defendant from further interfering

with its scales, and asked that an injunction issue commanding defendant to cease the enforcement of his regulation.

It is complainant's contention that the regulation offends the Federal Constitution, because:

1. It unjustly discriminates against complainant's scales and unreasonably denies to complainant the equal protection of the laws.

2. It takes complainant's property without due process of law.

3. It is an unauthorized interference with interstate commerce.

4. It impairs the obligation of contracts.

It will be noticed that defendant's regulation or specification affects only *combined spring and lever computing scales.* An automatic temperature compensating device is not required for non-computing spring scales. Neither is such device prescribed for non-computing spring and lever scales nor for computing scales actuated by springs without the use of a lever.

This is a feature of the specification to which complainant objects.

The exclusion from the operation of the rule of the three classes of scales mentioned is alleged to be without reasonable ground and a denial to complainant of the equal protection of the laws.

In support of this contention complainant showed upon the trial that the computing device was unaffected by any change of temperature, while all scales which include springs as one of the weighing factors are affected by temperature conditions. The computing device is simply a multiplication chart wound round the drum of the scale, and it no more affects the weighing of the scale than it would if hung upon the wall (pp. 62, 68).

It was shown further that the one scale of the combined spring and lever computing class on the market, equipped with a device satisfying the regulation of defendant, was subject to error (pp. 49, 73; Ex. K, p. 115).

Complainant's scale is equipped with a device which mechanically compensates for changes in temperature. This device, properly used, is of the greatest accuracy (p. 83). Defendant's sole objection to complainant's scale is that this device is not thermostatic in its action.

The claimed injustice and harshness of defendant's rule arises from the fact that the only scale company using an automatic compensating device is the owner of a basic patent coverng such device, so that it is impossible for complainant to comply with the specification (Exhibit C; p. 108).

The operation of the scale is upon the principle of a lever of the second class (see Ex. D, p. 114), The lever of the scale maintains a horizontal position. At the power end of the lever are attached perpendicular rods connected with the springs opposing the weight. These springs and the rods are located in a metal column. On top of the column is a metal cylinder inside of which is the drum. The drum is the indicator of the weight and money value of the commodity weighed.

The springs are not attached to the drum, but are suspended from a rod at the top of the column and below the drum.

At the power end of the lever and at a point beyond the springs, is attached a rack bar which runs vertically to the drum indicator at the head of the column. The drum rotates upon a horizontal axis, the dial shaft. At the center of the dial shaft the rack bar is fitted into a small

pinion. When a weight is placed upon the pan or platter of the scale, the lever is forced downward a distance measured by the resultant motion of the weight force downward and the power force (the springs) upward. This movement of the lever causes the rack rod attached thereto to move downward, revolving the indicating drum by means of the rack and pinion (Physical Ex. A).

As the temperature to which the scale is exposed becomes warmer or colder the springs lengthen or shorten. Lengthened springs allow the lever to drop, causing a *plus* error in indicated weight. Shortened springs cause a *minus* error (Physical Exhibit A).

In complainant's scale these errors are corrected by varying the travel of the rack rod. When *minus* errors occur, the union of the rack rod with the lever is moved further from, in *plus* errors nearer, the fulcrum. The position of the levers is unchanged (Complainant's Exhibit I; pp. 64, 65).

In this manner a method of changing the position of the pivots, injurious to continued accuracy, which is *used with scales equipped with automatic temperature compensating devices,* is avoided in complainant's scale (pp. 64, 65).

Around the drum of the scale is wound a heavy paper chart. At the right hand margin of the chart is a column which is marked with divisions indicating pound and ounce values. At the left of this pound and ounce column is a series of other columns which indicate money values. The whole chart is enclosed in the metal cylinder within which revolves the drum. In the cylinder encasing the drum is a glass covered aperture about an inch wide and extending the length of the cylinder. Through the aperture a

portion of each money value column and part of the weight indicating column, are visible. At the bottom of the aperture and directly below each money column, stationary upon the metal casing, numbers are located. These numbers represent prices per pound (Physical Exhibit A).

When a weight is placed upon the pan the drum upon which the chart is wound revolves to the extent of such proportion of its circumference as the weight upon the pan bears to the capacity of the scale; a weight equal to the full capacity of the scale causing one complete revolution (Physical Exhibit A).

A red horizontal line extends from end to end of the glass aperture parallel to the axis of the drum.

When the scale is in equilibrium, with the weight upon the pan, the graduation in the weight column which represents the weight upon the pan rests at a point directly opposite the red indicating line.

The value in dollars and cents of the commodity weighed is indicated by such money value graduation, coincident with the horizontal red line, as appears in the money value column representing the price per pound of the commodity weighed.

By no possibility can the money value indication of a certain indicated weight vary. The chart about the drum is a simple table of multiplications in which the weight indicated in the right hand column, multiplied by the numbers on the metal casing, equals the amount opposite the red line in each of the money value columns.

Manifestly, when the weight is correctly indicated the computations are mathematically and positively accurate.

Complainant, therefore, contends that if an automatic thermostat is required for computing scales, it should also be prescribed for non-computing scales. Again, if the vice of the scale lies in its computing faculty, other computing scales should come within the same class, though springs alone are used without the aid of a lever, or levers without the aid of a spring. If it is the combination of a spring and lever which causes the error then a non-computing spring and lever scale is as vicious as a computing spring and lever scale.

A second theory of the bill is that the defendant, in circulating, promulgating and attempting to enforce his specification, acts beyond the authority invested in him by law and that, his interference with complainant's scales being in excess of his lawful powers, the damage to complainant's business caused by a public officer acting under color of his office and without lawful right, takes complainant's property without due process of law.

The bill of complaint also alleges that defendant's regulation impairs the obligation of the installment contracts entered into between complainant and scale purchasers, and illegally interferes with the interstate commerce carried on by the complainant.

Specification of Errors.

1. The court below erred in failing to hold that the promulgation and enforcement of the regulation of August 15, 1914, deprived complainant of its property without due process of law in violation of the Fourteenth Amendment, in that said regulation unreasonably, arbitrarily capriciously and unnecessarily prohibits and prevents the sale

by the complainant, in the State of New York, of an accurate scale, and thus limits complainant's right to use and enjoy its property, and that such regulation and the limitation of complainant's rights of property thereunder bear no real or substantial relation to the preservation of the public health, safety morals or welfare; and further in that, because defendant has no power or authority under the New York Statutes, to enforce or promulgate said regulation, the taking of complainant's property thereunder is a taking without lawfully constituted authority, and therefore a taking without due process of law.

2. Said court erred in failing to hold that the promulgation and enforcement of said regulation, by the defendant, denies to complainant the equal protection of the laws in violation of the Fourteenth Amendment, in that said regulation unjustly and unlawfully discriminates against complainant's scale by prescribing that spring and lever computing scales which vary with temperature changes shall be equipped with an automatic device to compensate for such changes, whereas neither said regulation nor any other regulation of the defendant prescribes or attempts to prescribe automatic compensation for temperature changes in non-computing spring and lever scales, computing spring scales or non-computing spring scales, such non-computing spring and lever scales, computing spring scales and non-computing spring scales being equally susceptible to temperature changes, and that, therefore, said regulation creates an arbitrary classification of scales based upon no proper or reasonable distinction, excluding from its operation numerous other scales similarly situated with complainant's scale.

3. Said court erred in failing to hold that

said regulation constituted an unlawful restraint of and an unauthorized interference with Interstate Commerce, in that the exclusion from the New York market of said scales, manufactured in the State of Michigan, prevents the sale and use in the State of New York of an accurate and innocuous article of trade, which is a proper subject of interstate commerce.

4. Said court erred in failing to hold that said regulation impairs the obligation of contracts in violation of subdivision 1 of Section 10 of Article 1 of the Constitution, in that prior to the promulgation of the regulation complainant had sold scales to New York purchasers upon conditional sale contracts, under which payments were due complainant, and such regulation, by declaring complainant's scales illegal, destroys the obligation of the purchasers to pay therefor and defeats complainant's right of action under said contracts (pp. 130, 131).

5. The court erred in not making, rendering and entering a final decree adjudging the defendant's regulation unconstitutional and void, and granting an injunction against the defendant restraining him from further promulgating, enforcing or attempting to enforce said regulation and from interfering or attempting to interfere with complainant's scales.

6. The court erred in dismissing complainant's bill of complaint and entering final decree in favor of the defendant.

Argument.

Point I.

The Supreme Court has jurisdiction.

Point II.

The defendant's regulation denies to complainant the equal protection of the laws.

Point III.

The promulgation and enforcement of defendant's regulation takes complainant's property without due process of law.

Point IV.

The regulation is an illegal restraint upon interstate commerce.

Point V.

Complainant is entitled to equitable relief.

Conclusion.

The decree of the District Court should be reversed.

POINT I.

The Supreme Court has jurisdiction.

The Judicial Code provides that the United States District Court shall have original jurisdiction of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege, or immunity secured by the constitution of the United States (Sec. 24, sub. 14).

The bill of complaint alleges a direct violation

of the fourteenth amendment, also an interference with Interstate Commerce and an impairing of the obligation of contracts. The court below therefore had jurisdiction.

Section 238 of the Judicial Code provides that appeals may be taken direct to this court from the District Court in any case that involves the construction or application of the Constitution of the United States, and in any case in which the law of a state is claimed to be in contravention of the Constitution of the United States.

This is a direct appeal from the District Court for the Southern District of New York.

POINT II.

The defendant's regulation denies to complainant the equal protection of the laws.

The power of the state and of the duly authorized officers of the state to regulate the sale and use of weighing and measuring devices is unquestioned. The power to make and enforce rules and regulations applying to separate classes of scales is also conceded. Complainant's contention is that the classification established by the defendant is unreasonable and arbitrary, and rests upon distinctions having no fair or substantial relation to the object sought to be accomplished.

Atchison, Topeka & Santa Fe R. Co. v. Vosburg, 238 U. S., 56;
Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S., 150;
Connolly v. Union Sewer Pipe Co., 184 U. S., 540;
Smith v. Texas, 233 U. S., 630;

Powell v. Pennsylvania, 127 U. S., 678;
Magoun v. Illinois Trust & Savings Bank, 170 U. S., 283;
In re Marshall, 102 Fed., 323;
Kane v. Erie Railroad, 133 Fed., 681;
Grainger v. Jockey Club, 148 Fed., 513.

In *Atchison v. Topeka, etc., R. Co.* (*supra*), the Court, speaking of the 14th amendment, stated the following rule (p. 59):

> "The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation."

In *Gulf, Colorado & Sante Fe Ry. v. Ellis* (*supra*) Mr. Justice Brewer said at page 155:

> "But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While as a general proposition, this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in

> respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

It is the rule laid down in these cases that complainant invokes.

Some practical method of compensation for all scales affected by temperature changes might be demanded. The requirement of an eccentric temperature compensating device for scales which are unaffected by temperature cannot be justified as an exercise of the police power.

Though all spring and lever scales are affected by temperature, spring and lever scales which have no computing device are not included in defendant's regulation. Moreover, the computing device is unaffected by atmospheric conditions. It is a simple multiplication chart wound round the drum of the scale and could as well be hung upon the wall. It is not a mechanical device, but a reference table to obviate mental computations (p. 68). Defendant himself testified:

> "It does not violate the rule which is promulgated, if the computing card were hung on the wall instead of around a drum, then this would not violate the rule. If it indicated, for instance, five pounds when it should be four pounds, and there was no computation table on the scale, the merchant either computing in his mind or reading a computation table on the wall, would arrive at the same error as if the card were on the drum. And the same would be true of any scale" (p. 62).

Yet it is this non-mechanical computing device alone which places complainant's scale under the ban of defendant's regulation.

The exclusion from the operation of defendant's rule of non-computing spring scales and non-

computing spring and lever scales renders the rule just as unreasonable, as unjustifiable, as though scales of the type regulated were unaffected by temperature. For it is the computing feature of the scale that is aimed at and not its mechanical peculiarities.

The avowed object of the rule is to protect the public against dishonest weighing devices by requiring that scales which vary with temperature shall be so equipped that the change is compensated for. But the rule does not apply expressly to scales which temperature affects. It applies only to computing scales. In determining the validity of defendant's classification, the fact that complainant's scale is susceptible to the influence of temperature must be considered as merely incidental. The exclusion of non-computing spring or spring and lever scales, condemns the computing device as the evil to be corrected, while in point of fact the prescribed method of correction and the computing device are wholly unrelated.

All scales actuated by metallic springs vary with changes in temperature. This is a matter of common knowledge. It is found by the Court below (p. 124).

The Court then said:

> "In any contrivance which depends for efficiency upon the elasticity of metal there is an element of error introduced by changes of temperature. In such an apparatus as the scale under consideration a popular description of such capacity for error is to say that the spring 'stiffens up' in cold weather and relaxes or loosens in warm weather. When a *computing* scale ultimately depends for its proper function upon such a spring it is obvious that an erroneous weight produces increasing erroneous price, as the amount bought becomes greater."

The statement of the Court that in a computing scale an erroneous weight produces an increasingly erroneous price, as the amount becomes greater, is misleading, as confined to computing scales.

It is, of course, obvious that the greater the weight the greater the price. This is undeniable, for the weight necessarily regulates the price. Price is price per pound multiplied by weight, and, weight being increased, price is likewise increased. An increase in weight may cause an increase in error, that is, error in weight, but *it does not cause an increased error in price upon a computing scale any more than upon any other scale.* In complainant's scale a given weight is automatically multiplied by a given price per pound. There is never error in this multiplication. No such contention is made by defendant. In using the ordinary spring and lever scale with no computing device, a given weight must be independently multiplied by a given price per pound. In both computing and non-computing scales error in weight obviously causes error in price, and increasing error in weight just as obviously causes an increasing error in price.

Variation in weight is caused in all spring scales by changes in temperature. Compensation for this variation may be desirable, but it is just as desirable in a non-computing scale as in complainant's scale. It is not multiplication that temperature affects, but springs. The product of two multiplied by two at the equator is the same as two multiplied by two at the north pole.

Legislation which abridges the right of property, in order to be constitutional, must operate equally upon all property similarly situated. Defendant's regulation, purposed to protect the public against

scales which vary with temperature, should include all scales which vary with temperature.

Powell v. Pennsylvania (supra), at p. 687;
Kane v. Erie Railroad (supra).

In the case of *Smith v. Texas* (supra), the plaintiff-in-error was convicted of violating a Texas statute which provided that no person should act or engage as a conductor on a railroad train in Texas unless he had served for two years prior thereto as a brakeman or conductor on a freight train.

Plaintiff-in-error had never served as a brakeman or conductor but had served as fireman and engineer. He had been in the railroading business for twenty-one years. No claim was made that he was not competent to perform the duties of the position for acting in which he was convicted.

Plaintiff-in-error argued that the Texas statute and his conviction thereunder were in conflict with the Fourteenth Amendment to the Federal Constitution.

The Court, reversing the conviction, said, by Mr. Justice Lamar, pages 638, 639:

> "The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position.

Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

"2. The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been freight conductors in other states, to act in the same capacity in the state of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification for appointment as conductor than that for two years the applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.

"For it is to be noted that under this statute, not only the general public, but also four classes of railroad men, familiar with the movement and operation of trains, and having the same kind of experience as a brakeman, are given no chance to show their competency, but are arbitrarily denied the right to act as conductors. The statute excludes firemen and engineers of all trains, and all brakemen and conductors of passenger trains. But no reason is suggested why a brakeman on a passenger train should be denied the right to serve in a position that the brakeman on a freight train is permitted to fill. Both have the same class of work to do, both acquire the same familiarity with rules, sig-

> nals, and methods of moving and distributing cars, and if the training of one qualifies him to serve as conductor the like training of the other should not exclude him from the right to earn his living in the same occupation."

and at page 641:

> "3. So that the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer—and the answer in no way denies the right of the state to require examinations to test the fitness and capacity of brakemen, firemen, engineers, and conductors to enter upon a service fraught with so much of risk to themselves and to the public. But all men are entitled to the equal protection of the law in their right to work for the support of themselves and families."

In the case of *In re Marshall* (*supra*), a county ordinance of Marin County, California, prohibited the use of any kind of a repeating shotgun or a magazine gun for the purpose of killing or destroying any kind of wild duck, geese, quail, partridge, doves, or any other birds.

Defendant, convicted of a violation of the provisions of the ordinance and sentenced to imprisonment, sued out a writ of *habeas corpus* to the Circuit Court of Appeals, alleging that the ordinance and defendant's imprisonment thereunder were in contravention of the provisions of the Federal Constitution.

The complaint against the defendant charged, and the evidence showed, that he had killed one quail and one blue jay with a repeating shotgun.

The Federal Court held the ordinance uncon-

stitutional because it deprived defendant of the use of his property, the gun, without due process of law, and also denied to him the equal protection of the laws.

At pages 326, 327 it was said:

> "Enough has been said, I think, to show that the section of the ordinance under which the petitioner was convicted and is imprisoned is unconstitutional and void. But the further the matter is looked into the more indefensible does the judgment of conviction appear. As has been seen, the charge against the petitioner upon which he was convicted, and for which he was sentenced to imprisonment, was the killing of one quail and one blue jay. Now, neither by the ordinance of Marin County, nor by any statute of the state of California, are blue jays in any way protected except by those provisions of the ordinance in question which declare it a misdemeanor for any person to use a repeating or magazine shotgun 'for the purpose of killing or destroying any kind of wild duck, geese, quail, partridge, grouse, doves or any other birds'. This ordinance does not assume to protect blue jays in any other way, and I think it would puzzle any one to give a sensible reason why it should; for they are well known pests, and are unfit for human food, and are therefore not within the purview of the police power in respect to game, the source of which, said the Supreme Court in *Geer v. Connecticut*, 161 U. S. 534, 16 Sup. Ct. 606, 40 L. Ed. 799, 'flows from the duty of the State to preserve for its people a valuable food supply.' Yet a blue jay was one of the two birds the petitioner was charged with, and convicted of killing, and for which he was imprisoned. And that blue jay the ordinance in question permitted the petitioner, or any other person, to kill with a rock, rifle, cannon, double or single barreled shotgun, or with any other

> thing than a repeating or magazine shotgun. Such discriminatory legislation, without any basis of sound reason to rest upon, is, in my opinion so plainly void as to require no further comment."

And so in the case at bar, the penal law of the State of New York prohibits the use of dishonest weights or measures. The defendant's regulation does not affect dishonest scales, but *computing* spring and lever scales lacking a compensating device. Any other spring scale, and there are countless numbers, may be used if accurate but complainant's scale cannot be used, accurate or not. Certainly defendant's regulation is as arbitrary and unreasonable as the ordinance of the County of Marin, California.

In *Kane vs. Erie R. Co.*, (*supra*), Judge Richards said at page 686:

> "A valid classification for legislative purposes 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis' (citing cases). It must be grounded upon 'a reason of a public nature,' and '*the act must affect all who are within the reason for its enactment*' (citing cases)." (Italics ours.)

Complainant contends that the manufacturers of all scales which vary with temperature are situated similarly and that a compensating device required of one should be required of all.

Certainly the fact that all spring scales are alike affected by temperature cannot be doubted.

Francis C. Osborne, an expert called by complainant testified:

> "The variations of temperature affect in spring scales, the springs, and it affects all

spring scales whether they are spring and lever, or whether they are spring and lever computing.

* * * * * * *

"The fact that a scale is a combined spring and lever scale, does not make any difference with regard to the effect of the temperature, whether it is a spring and lever or whether it is simply a spring scale (p. 48).

* * * * * * *

"So far as changes in temperature are concerned and the difference between a spring scale, a spring and lever scale, and a spring and lever computing scale, requiring an automatic thermostat, as I have stated, all spring scales are affected by temperature and they are all practically affected the same amount. That is, a twenty degree change in temperature will amount to about an ounce in effect" (p. 49).

Neither defendant nor his expert Reichmann contradict Osborne in a single particular.

Defendant's testimony is important and vital, for it is the reasonableness of the rule which is attacked, and defendant's motives and reasons for discriminating against computing scales are to be considered in deciding the validity of his attempted classification.

The most careful analysis of defendant's testimony fails to disclose a single reason why compensation is less necessary in non-computing scales, than in computing scales.

Defendant contends that computing scales are read in money values and not by weight, that is, when a merchant places a commodity upon the scale he looks at the price column, not at the weight column.

Even if this is so, it is difficult to understand what injury results. If there is error in the

weight, there is, of course, error in the price. If the scale user looks at the price he gets an error, but if he reads the weight and mentally multiplies by the price per pound, the resulting price is exactly the same.

Now defendant asserts that the dial of complainant's scale is divided into more minute gradations than upon ordinary spring scales. The chart being divided into penny gradations, the values of more than sixteen cents per pound commodities are indicated in prices which result from a multiplication of the price per pound by fractions of an ounce. Consequently, the money value gradations are more closely spaced than weight gradations upon scales indicating pounds and even ounces. The evil in this is a mystery. If a commodity selling at 32 cents per pound were placed upon the pan of the ordinary spring and lever scale, the weight indication would be in even ounces. Thus a three and a half ounce weight would register between the three and four ounce mark. The merchant, as defendant testified (fol. 546), would read to the nearest gradation and multiply by the price per pound. The scale balancing equidistant between three and four ounces, the merchant naturally charges for four ounces and the customer pays eight cents for a seven-cent purchase. If the merchant is over scrupulous, the customer pays six cents and the merchant takes the loss. In complainant's scale, when the weight indication is between three and four ounces, the price is indicated *correctly* at seven cents.

Defendant argues, however, that since complainant's chart is so minutely divided, an error which would vary the scale to the extent of a fraction of an ounce, would result in a movement of the

drum equal to one entire graduation, while the movement in a spring and lever non-computing scale would move the indicating pointer only a fraction of an ounce and would thus be disregarded.

Reference to the previous illustration will bare the absurdity of this contention. An error in complainant's scale which would cause the three and one-half ounce weight to indicate a four ounce weight, would cause a loss to the customer of one cent. The indication upon the computing chart would be 8 cents. On the ordinary spring and lever scale the indicator would move only half the distance of one graduation, but it would none the less indicate four ounces and the dealer would demand 8 cents. If on the other hand, the weight on the pan were three ounces, a one-half ounce error would result in a three and one-half ounce indication on the ordinary spring scale with a reading by the merchant of four ounces and a loss to the customer of *two* cents. The same error on complainant's scale would result in a 7 cent reading or a loss of *one* cent.

In any event, this feature of computing scales would not be changed by a compliance with defendant's regulation. Error from any cause would cause an erroneous movement of the drum, undetected in non-computing scales. This frivolous objection to computing scales is not a result of temperature changes. It is not corrected by a temperature compensating device, nor by any other device known or suggested. Temperature compensating devices are as unrelated to defects incident to the computing feature as computing charts are to temperature changes.

The defendant's regulation goes far beyond the limits imposed by the Constitution. It chooses

from the great number of scales affected by temperature changes one particular type of scale, and prescribes that this type alone shall be equipped with one particular compensating device. Ordinary spring scales, non-computing spring and lever scales and computing spring scales are exempted from the regulation.

We are familiar with the decisions in *Central Lumber Company v. South Dakota*, 226 U. S., 157; and *Armour & Company v. North Dakota*, 240 U. S. 510, which go far in upholding the State police power. In none of these cases is the rule denied, that the police power must be exercised reasonably and not arbitrarily.

In the case of *Central Lumber Co. v. South Dakota, supra*, plaintiff-in-error contended that a statute which prohibited any person from selling goods at lower prices in one vicinity than in another denied to it the equal protection of the laws, as it only affected those doing business in two localities. But that statute was reasonable and necessary to prevent the unfair methods of competition indulged in by powerful corporations. The court held that a statute need not apply to all possible abuses, but it did not hold that identical offenders in the evil aimed at could be classified and some excused while others were condemned.

In *Armour & Company v. North Dakota, supra*, a statute was upheld which prohibited the sale of lard in tin pails of other than one, three or five pounds net weight, or some whole multiple of these numbers.

The contention was that the exclusion of butter and other food products from the operation of the statute denied to plaintiff-in-error the equal protection of the laws. It is probable the court

considered the fact that lard is the one article generally sold in tin pails. Abuses not existing were not necessarily included. But the court did not hold that, had the statute applied only to yellow tin pails or pails with a certain design of handles, it would have been valid. The computing device upon complainant's scale has no more relation to the temperature than the color of the pail to the weight of the lard.

In the two cases cited above there was some relation between the legislation and the object to be accomplished, *particularly applicable* to the classes affected. In the case at bar the rule applies particularly to *computing* scales, whereas computing charts are no more affected by temperature changes than by the political aspect of Congress.

A law decreeing the segregation of all lepers might be a valid exercise of the police power, but a law providing for the segregation of all short statured lepers would unquestionably offend the fourteenth amendment. Similarly, a rule prescribing a compensating device for all spring or spring and lever scales might be upheld, while it could not be limited to computing scales.

The rule is void.

POINT III.

The promulgation and enforcement of defendant's regulation takes complainant's property without due process of law.

THE REQUIREMENT OF AN AUTOMATIC COMPENSATING DEVICE IS UNREASONABLE AND VOID.

Saleability is an essential attribute of property, and any law, ordinance, regulation or restriction which destroys the saleability of property takes such property from the holder thereof.

Wright v. Hart, 182 N. Y. 330;
Wynehamer v. People, 13 N. Y. 378;
Ingersol v. Railroad, 157 N. Y. 453;
Powell v. Pennsylvania, 127 U. S. 678;
Allgeyer v. Louisiana, 165 U. S., 578;
Butchers' Union etc., Co. v. Crescent City etc., Co., 111 U. S. 746;
Slaughter House Cases, 16 Wall., 127.

The defendant has argued that the sale of scales is not prohibited by the regulation. Their use, however, is forbidden, and consequently their saleability destroyed.

Private property of which saleability is an essential element, can only be taken or destroyed (1) by the exercise of the police power of the state; (2) pursuant to the right of eminent domain; (3) under the taxing power.

Defendant's regulation is an attempted exercise of the police power.

The exercise of the police power is justifiable only when the interests of the public require it, and when the means used are reasonably necessary for the accomplishment of the desired purpose and are not unduly oppressive. Such legislation must be reasonable, not arbitrary nor capricious.

Peo. ex rel. Wineburgh v. Murphy, 129 App. Div., (N.Y.) 260 (aff'd. 195 N. Y., 126);
City of New York v. Wineburgh Advertising Co., 122 App. Div. (N. Y.) 748;
Matter of Jacobs, 98 N. Y., 98;
Ives v. Railway, 201 N. Y. 271;
Dobbins v. Los Angeles, 195 U. S., 223;
People v. Gilson, 109 N. Y., 389;
Mugler v. Kansas, 123 U. S., 623;

Minnesota v. Barber, 136 U. S., 313;
Hennington v. Georgia, 163 U. S., 299.

In *Ives v. Railway,* (*supra*), Judge Werner said at page 301:

> "In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the courts to declare it invalid, for legislative assumption of the right to direct the channel into which the private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government."

In *City of New York v. Wineburgh Adv. Co.,* (*supra*), it was said at pages 753, 754:

> "To justify an act or ordinance which in any degree interferes with the liberty of the individual, or with the full enjoyment by him of his property, it must appear by reasonable intendment that it is calculated, in tended, convenient and appropriate to conserve the public health, welfare, comfort or morals, and while it lies primarily within the discretion of the enacting body to determine what laws are appropriate and proper for that purpose, *yet the duty remains in the courts when called upon to scrutinize the measures sought to be enforced to see whether they really fall within the limitations of the police power*" (italics ours).

In *People v. Gilson,* (*supra*), the Court said at pages 401, 402:

> "Courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the ends above mentioned. Unless such relation exist the enactment cannot be upheld as an exercise of the *police power.*"

The rule in the United States Courts is the same.

In *Mugler v. Kansas,* (*supra*), the court said, page 661:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

In *Hennington v. Georgia,* (*supra*), at pages 303, 304:

> "In what light is the statute of Georgia to be regarded? The well-settled rule is that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

From these decisions we deduce the rule that there are two essential conditions to the validity of each attempted exercise of the police power.

FIRST: That the legislation must "tend in some degree to prevent some offense or evil or to preserve the public health, safety or welfare."

SECOND: That the means are not unduly oppressive upon "individuals" and do not impose unusual and unnecessary restrictions upon lawful occupations.

The only known or suggested method of automatic compensation for temperature changes is covered by a basic patent owned by a competing company (p. 70; Complainant's Exhibit C, pp. 108, 114). This was the finding of the trial court (p. 124).

It is therefore impossible for complainant to equip its scale with an automatic compensator, and it must either make terms with its competitor, or discontinue the manufacture and sale of scales.

Under such circumstances we contend that an accurate mechanical device, more reliable than the automatic device in use, must satisfy any legitimate exercise of the police power of the state.

It was shown upon the trial that the automatic compensator shifted the power pivots in the scale and that this moving of the pivots was conducive to inaccuracy. In manufacturing scales it is necessary that the pivots be precisely located. This cannot be actually pre-determined by mensuration with any instrument of precision that could be practically used. They may be approximately placed in their position by measurement, but the final adjustment must be made by actual tests, and when determined the pivots should be fixed (p. 64).

The method of automatic compensation, shown to the court, involves a constant changing of the position of the pivots, for at each rise or fall in temperature this device moves the long lever of the scale thus causing an ever varying leverage (p. 64.).

In complainant's scale the position of the pivots is never moved. The compensating device affects only the recording mechanism by changing the travel of the rack rod (p. 64).

Another feature makes the automatic device

unreliable and impracticable. The only known automatic device consists of seventeen bars of metal, some brass, some steel. The effect of temperature is to expand or contract the thermostat, causing a movement of the lever pivots and lengthening or shortening the long lever. In this way the effect of a load upon the pan is either diminished or increased (p. 71).

The thermostat is located in a heavy metal casing weighing seventeen or eighteen pounds. The springs are located in a thin light casing (p. 71). When a change in temperature occurs the light metal springs respond quickly to its effect, but the heavy thermostat is slow to assume the new temperature and fails to compensate (p. 71; Exhibit K, pp. 115, 119).

In discussing the merits of the automatic and mechanical compensator, the Court below said:

> "The only compensating method shown to the court is covered by a patent and owned by a scale manufacturing company. It functions by using the different rate of contraction or expansion of different metals to produce less or more tension upon the weighing spring as the condition of the thermometer may require, the scale being balanced and adjusted at a given temperature with the compensating metals in known positions.
>
> "So far as shown, this method of compensation is accurate *but slow; that is to say it will take perhaps some hours to get a scale which has gone wrong through a drop in the temperature of say* 30 *degrees, to again become accurate.* But it is impossible to prevent the operation of this automatic device except by such crude devices as inserting a bar or stick in the scale to prevent its operating at all.
>
> "The complainant has no automatic compensation upon its scale but it has a mechanical compensator. The fact that the scale is no

longer true is shown by an examination of the indicator card. If that error is caused by expansion or relaxation of the spring it can be corrected by increasing or diminishing the tension upon that spring by turning a screw. This correction can be made *instantly*, and in the hands of an honest and even reasonably intelligent owner I see no reason why complainant's scale is not as good, *and more easily corrected* than a machine containing an automatic device of the kind roughly described" (pp. 124, 125).

Defendant's regulation seeks to impose upon complainant an impossible and oppressive burden. It prescribes the adoption of a device which only one scale manufacturer in the United States may lawfully use. The Computing Scale Company of Dayton, Ohio, is the owner of an exclusive, basic patent covering automatic compensation for spring and lever computing scales. The rule therefore limits the market for spring and lever computing scales, in the State of New York, to one company. Defendant will approve but one type of scale and that type is covered by a patent.

Complainant must cease to do business in this state or disobey either defendant's regulation or the patent laws. Certainly, the establishment of a monopoly for a rival company at complainant's expense is a harsh and unnecessary method of protecting the public from the remote possibility of being defrauded by complainant's scale. It is doubtful if the public would choose to be thus protected. Monopolies are as much against public policy as weighing frauds and the certain establishment of the former to guard against the possible but improbable occurrence of the latter should find as little favor in law as it must in public morals.

But even if the rule were not unnecessarily stringent, it cannot be sustained unless the courts can see that it necessarily tends to prevent some public evil and to protect public health, morals or safety.

It is complainant's contention that its scale is an accurate and just one equipped with a device which efficiently and adequately compensates for changes in temperature. The suppression of an accurate scale certainly does not tend to promote the public welfare.

Defendant contends that the scale is inaccurate.

Testimony was adduced by both sides to support their claims on this point.

Complainant's witness Osborne had been a designer, developer and manufacturer of special machinery and patentable devices and for the last seventeen years engaged in the development and manufacture of scales of the type manufactured by complainant (p. 48).

Osborne testified that the mechanical temperature device on complainant's scale was very accurate. He was of the opinion that an automatic thermostat was not necessary for any scale (p. 49). He found from actual test that the automatic thermostat on the Dayton scale was not accurate (p. 51). But that the springs of the Dayton scale, being surrounded by less metal than the thermostat, responded more quickly to temperature, with the result that the scale is inaccurate (p. 51). A table of the tests of the Dayton scale made by the witness demonstrates this inaccuracy (Ex. K., pp. 115, 119).

Complainant's device is always, when properly used, accurate.

Defendant's expert Reichmann was of the opin-

ion that the requirement of an automatic thermostat was one which no honest or fair minded official would require (pp. 55, 56, 83). Reichmann also testified that the device with which complainant's scale was equipped was an accurate device (p. 83). He testified to a number of ways in which complainant's scale could become inaccurate, but admitted that such was the case with all scales. If complainant's scale were used in accordance with the directions and instructions, he said, the mechanical device would not aid in the perpetration of a fraud (84, 85).

But the testimony of Reichmann and Osborne is opinion evidence of experts. It is theoretical only. Let us see what the testimony of the practical scale users develops.

Daniel D. Snell, county sealer of weights and measures of Saratoga County for five years, had become familiar with the Standard scale in the course of his official duties. Prior to the promulgation of defendant's regulation Snell had sealed (i. e. approved) these scales. He had tested them since the regulation but had not sealed because of the regulation, though the tests made by him were the same (p. 22). He would not have discontinued sealing had it not been for the regulation (p. 23). Snell found the complainant's scale more accurate than Dayton scales (pp. 23, 24).

A. J. Reid, sealer of Middleville, N. Y., sealed the scales (pp. 37, 38) (see Exhibits 7, 8 and 9, pp. 104, 108).

John J. Mann, county sealer of Albany county, also sealed the scales (p. 40).

We submit that the testimony of these sealers is of more value than the opinion of any number of expert scale men. The witnesses were performing an official duty imposed by the statute,

to test all scales and seal those found accurate. It is to be presumed that these men did not violate their duties. The tests made by the local sealers were made under usual trade conditions. A sealed weight was placed upon the pan of the scale and if the scale registered such weight correctly is was accurate. Such a test is the absolute test of efficiency.

Three instances occur where complainant's scales were adjudged slow and faulty. These were not instances of official action by *local sealers,* but the acts of *defendant's inspectors directly under defendant's control and direction, and carrying out defendant's arbitrary purpose.*

George B. May, a butcher, testified as follows:

> "When he came in and told me he was from the State Department of Weights and Measures, I told him to go ahead and he says, 'I see you have the Standard Scale,' and I said, 'Yes,' and he says, 'Do you know they are not accepted by the State Department?' and I said, 'No,' and said, 'For what reason?' and he said, 'On account of the Thermostatic device,' and I says to him, 'Test the scales,' and he tested them and could not find any fault with them any more than that they was giving on his first test a triflle over a half an ounce too much on the pound, and I says to him, 'That is not a very bad test on a scale,' and he said, 'No, but they are slow and faulty.' I says to him, 'How are they slow and faulty when they actually give more than weight?' Then he tells me that I cannot use them and I called his attention to the fact that the Sealer of Weights and Measures has already sealed the scales, and I asked him if I continued using the scales what would be done about it, and he said perhaps I'd lay myself liable to suit. And then I asked him what scale he would recommend and why. He says, 'It is not up to the Sealer of Weights and

> Measures to recommend any scale. But,' he says, 'what was the matter with the scale that you had?' and I told him there was not anything only it had got dirty, the enamel was off and that it did not look very good. And I says to him from that probably that a Dayton scale would be acceptable to the State Department and he said the Dayton scales were all right" (p. 32).

A slip was left with May describing the scale as slow and faulty (Ex. 2, p. 101).

Later, county sealer Gaffey visited May's store and examined this same scale. He certified that the "scale weighs correct but does not comply with New York State Specifications" (Ex. 4, pp. 102, 103).

Previous to the promulgation of defendant's regulation Gaffey had sealed May's scale and would have continued doing so had it not been for such regulation (pp. 35, 37).

Gaffey was not appointed and could not be removed or disciplined by defendant. He was free therefore, to exercise his own honest judgment and his judgment was that the scale was correct.

Roy F. Ackler testified that a *State official* had visited his grocery store and marked scales slow and faulty (p. 24). Ackler, shown by his cross examination to be a skilled mechanic, had adjusted his scales himself. He also had a Dayton scale in his store which was approved by this State official. Ackler had compared the Dayton with the Standard scale, and as far as he could see "they were exactly alike in the weighing" (pp. 24, 25).

John W. Prescott, a butcher also had his Standard scale marked slow and faulty by a State official (p. 28).

County sealers Snell, McConnell, Gaffey, Mann

and Reid had tested the Standard scales and sealed them (pp. 22, 23, 35, 37, 38, 40, Ex's. 7, 8, pp. 104, 106).

Thus, *State weight and measures inspectors* "whom the defendant" *does* "appoint" and whom he "*can* remove or discipline," marked the Standard scales slow and faulty, though such scales compared exactly with scales approved by them, and though *local officials* "whom the defendant *does not* appoint, and whom he cannot remove or discipline," had tested and found correct the very scales condemned by them.

The acts of defendant's agents, who adjudged faulty, scales found accurate by public officials not amenable to defendant's will, show the caprice of defendant in his determination to accomplish his arbitrary purpose by the enforcement of a pet rule of his administration.

It is intimated by the Court below (p. 126) that because the province of weights and measures is historically subject to government regulation, no particular scale is entitled to governmental protection.

We are constrained to criticize this conclusion of the Court. Any business which is a source of profit to its proprieter, any *chose* which is the subject of private ownership is protected by the Constitution. The right to sell scales is a right of property which can only be divested or impaired when the public welfare requires. It is not enough that the public officer acting to destroy that right of property is honestly attempting to promote the public good, but the courts must be able to see that the operation of the statute or regulation promotes that purpose. The relation of the act to the prevention of some public evil must actually exist and must be plain to the courts.

In *Wynehamer v. People*, 13 N. Y., 378, Judge Comstock said at pp. 392, 393:

> "*To say, as has been suggested, that 'the law of the land' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away.* The true interpretation of these constitutional phrases is that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least it cannot be *created* by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; now will it make any difference, although a process and a tribunal are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the constitution, then the legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the constitution in the same category with liberty and life." (Italics ours).

In *Marbury v. Madison*, 5 U. S. (1 Cranch), 137, this court said:

> "To what purpose are powers limited, and

to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained."

The Court below states:

> "It surely needs no citation of authority to prove that, where a discretion is lawfully vested in and honestly exercised by a duly appointed official, for the courts to interfere therewith is to substitute their own discretion or opinion for that of the officer in whom the same was (in contemplation of law) vested by the electorate or executive appointing power" (p. 127).

It is true that the courts will not usually interfere with the discretion of a public officer, but where a constitutional right is involved the courts will and in duty must decide whether or not any particular legislative act is reasonably necessary to the public good.

People ex rel Empire City Trotting Club v. State R. Comm., 190 N. Y., 31;
People ex rel Lodes v. Dept. of Health, 189 N. Y., 187;
People ex rel Single Paper Co., Ltd. v. Edgcomb 112 App. Div. (N. Y.) 604;
Chicago, Minnesota & St. Paul RR. v. Minnesota, 134 U. S., 418;
Dobbins v. Los Angeles 195 U. S., 223, 238;
Munn v. Illinois 94 U. S., 113.

Courts exist to protect constitutional rights, and it is an absurdity to say that whether or not a particular legislative act infringes those rights is a political, not a judicial question.

The regulation goes far beyond the limits imposed by the Constitution upon all public officials and is most invidious.

It chooses from the great numbers of scales affected by temperature changes one particular class and prescribes that that class alone shall be equipped with one particular temperature compensating device. It precludes all other devices, whether accurate or inaccurate and chooses the one device which is patented by a rival company for the one class of scales which such patent covers, and which is owned by the one company with which complainant's scale competes.

What would be the effect of this regulation if its operation were extended throughout the nation, instead of being confined to the State of New York? It would limit the sale of computing scales to one company of men and prohibit the other one hundred million of people from conducting a legitimate and profitable business. Would the courts then hesitate to interfere? And yet if valid for a limited area the regulation is valid everywhere within the country. If upheld in New York, this regulation will be adopted in every state where the Dayton Company's agents or lobbyists can exert sufficient influence to secure its passage, and the monopoly to which defendant has given birth will increase in magnitude at the expense of other manufacturers and of the public at large.

POINT IV.

The regulation is an illegal restraint upon interstate commerce.

Should the Court incline to the view that it is without power to declare void the classification established by defendant upon the ground that such classification violates the Fourteenth amendment of the Federal Constitution, there still re-

mains for consideration the question of an unlawful interference with interstate commerce.

The complainant is a Michigan corporation manufacturing its scales in the State of Michigan. The scales are sold to buyers in this state and shipped from Detroit direct to the purchaser.

The distinction between the legality of the regulation upon the ground that it violates the Fourteenth Amendment and upon the ground of an interference with interstate commerce is best pointed out by a consideration of two cases:

Powell v. Pennsylvania, 127 U. S., 678,

and

Schollenberger v. Pennsylvania, 171 U. S., 1.

Both cases arose under the same statute which provided as follows:

> "Sec. 1. That no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession, with intent to sell the same, as an article of food.
>
> "Sec. 2. Every sale of such article or substance, which is prohibited by the first section of this Act, made after this Act shall take effect is hereby declared to be unlawful and void, and no action shall be maintained in any of the courts in this State to recover upon any contract for the sale of any such article or substance.
>
> "Sec. 3. Every person, company, firm, or

corporate body who shall manufacture, sell, or offer or expose for sale or have in his, her or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this Act, shall, for every such offense, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the Commonwealth as debts of like amounts are by law recoverable; one half of which sum, when so recovered, shall be paid to the proper county treasurer for the use of the county in which suit is brought and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

"Sec. 4. Every person who violates the provisions of the first section of this Act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten or more than thirty days, or both such fine and imprisonment for the first offense, and imprisonment for one year for every subsequent offense."

In the earlier case the plaintiff in error attacked the statute upon the ground that it violated the Fourteenth Amendment. Mr. Justice Harlan said at page 684:

"The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The Court assents to this general proposition as embodying a sound principle of constitutional law."

It was however held that the statute did not create an unlawful classification and found that the statute had a real and substantial relation to the purposes sought to be encompassed.

The constitutionality of the statute and plaintiff-in-error's conviction thereunder was sustained.

In the later case plaintiff-in-error contended that oleomargarine being a proper subject of interstate commerce, no state could absolutely prohibit its introduction and sale within its border simply because such article in the course of its manufacture might be adulterated by dishonest manufacturers for the purpose of fraud and gain, and that the sale in original packages, for which defendant below was convicted, was lawful. The Court sustained this contention.

At page 14 it was said:

> "We do not think the fact that the article is subject to be adulterated by dishonest persons in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any state through its legislature to forbid the introduction of the unadulterated articles into the state. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly and under some circumstances be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopedias, but there was no affirmative evidence offered, on the trial, to prove the fact. From these sources of information it may be admitted that oleomargarine, in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a state to

> absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one."

And so, in the case at bar, the statute makes it a crime to use a false weight. The regulation of defendant forbids all complainant's scales, whether false or accurate.

Continuing in the *Schollenberger* case, the Court said:

> "It is claimed, however, that the very statute under consideration has heretofore been held valid by this court in the case of *Powell v. Pennsylvania*, 127 U. S., 678. That case did not involve rights arising under the commerce clause of the Federal Constitution. The article was manufactured and sold within the state, and the question was one as to the police power of the state, acting upon a subject always within its jurisdiction. The plaintiff-in-error was convicted of selling within the commonwealth two cases containing 5 pounds each of an article of food designed to take the place of butter, the sale having taken place in the City of Harrisburg, and it was part of a quantity manufactured in and, as alleged, in accordance with the laws of the commonwealth. The plaintiff-in-error claimed that the statute under which his conviction was had was a violation of the 14th Amendment to the Constitution of the United States. This Court held that the statute did not violate any provision of that amendment, and, therefore, held that the conviction was valid.
>
> "The *Powell* case did not and could not involve the rights of an importer under the commerce clause. The right of a state to enact laws in relation to the administration of its

> internal affairs is one thing, and the right of a state to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect wholly within the state and upon products manufactured and sold therein might be held valid as not in violation of any provision of the Federal Constitution, when at the same time legislation directed towards prohibiting the importation within the state of the same article manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other states, arising under the commerce clause of that instrument."

We submit that the *Schollenberger* case is identical in principle with the case at bar.

See also

Minnesota v. Barber, supra.

Defendant attempted to show upon the trial that complainant's scale might be used to defraud, though defendant's expert admitted that this was so with all scales.

Defendant's expert also admitted that, though it is possible to use the scale dishonestly, if used in accordance with the directions it would not aid in the perpetration of a fraud.

The rule unlawfully interferes with interstate commerce.

POINT V.

Complainant is entitled to equitable relief.

The first and second paragraphs of the prayer for relief in complainant's bill ask that defendant's regulation be declared void. The third paragraph asks that it be adjudged that complainant has no adequate remedy at law.

The fourth paragraph asks that defendant be enjoined from interfering with complainant's scales and from ordering or directing prosecutions of the users thereof; also that defendant be restrained from directing the various county and city sealers not to seal complainant's scales.

None of the relief prayed for was granted.

A court of equity has power to declare a particular statute or ordinance void, as was done in

Smyth v. Ames, 169 U. S., 466.

EQUITY WILL RESTRAIN THE ENFORCEMENT OF A VOID OR UNCONSTITUTIONAL ENACTMENT, AND WILL RESTRAIN CRIMINAL PROSECUTIONS OR CIVIL SUITS THEREUNDER.

Van Deman v. Rast, 214 Fed., 827;
Dobbins v. Los Angeles (supra);
Davis & F. Mfg. Co. v. Los Angeles, 189 U. S., 207;
Smyth v. Ames (Supra);
Regan v. Trust Co., 154 U. S., 362;
Ex Parte Young, 209 U. S., 123.

The complainant contends that defendant can be restrained from promulgating the rule complained of and from giving further instructions to the local sealers detrimentally affecting complainant's scale.

Complainant's business has been interfered with and destroyed; its property has been taken without due process of law. Defendant's conduct is directly responsible for complainant's loss and can be enjoined.

The Court below hints that mandamus is the proper remedy (Opinion p. 128), but this is erroneous. The complainant seeks to prevent de-

fendant's unauthorized acts, and mandamus is not available to obtain injunctive relief.

Faile v. Ferris, 76 N. Y., 326;
Requa v. Neubrand, 32 App. Div. (N. Y.) 49.

Though no Federal cases have been found which support or vary the rule of *Faile v. Ferris*, the decision in that case appears reasonable and proper. Mandamus is resorted to to command action where a plain official duty exists, not to restrain threatened or continuing acts.

The Court suggests no other legal remedy and indeed there is none. It is a question if an action for damages against defendant in his individual capacity could be maintained, even if such relief would be adequate. An action against defendant in his official capacity is an action against the state and certainly can not be maintained.

But no action for damages would be adequate for the injury to complainant is irreparable and unascertainable. The action of defendant has been advertised by competing companies throughout the United States. The loss to complainant outside of the State of New York could not be determined, as it is impossible to say just what is the effect of this undesirable advertising.

It is a fundamental maxim of jurisprudence that equity will suffer no wrong to be without a remedy, and where no relief at law is available equity will interfere.

Furthermore, a remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity.

Walla Walla v. Walla Walla Water Co.,
172 U. S., 1.

Mandamus could not be maintained because there is no action of defendant that complainant seeks to compel. It might be suggested that defendant could be commanded to abrogate his rule by the circulation of a rescinding pamphlet. A proceeding to obtain a writ for this purpose would be promptly dismissed, as it involves the compulsion of no *plain official duty*. Indeed, one theory of complainant's bill is that defendant had no authority to promulgate his specification. It would, therefore, be beyond the scope of his official duty to revoke the same.

Mandamus might, perhaps, be maintained to compel the local sealers to seal complainant's scales, but such remedy would involve a multiplicity of suits against each individual sealer in respect to each scale in such sealer's district to compel them to perform an act which they are perfectly willing to perform, but for defendant's regulation, which, before the adoption of such regulation, they did perform.

The complainant seeks an injunction to prevent the defendant under color of his office from sending further instructions to local sealers, and to restrain suits against the users of the scales. This the Court has power to do and, the specification being unconstitutional, should do.

CONCLUSION.

The decree of the District Court should be reversed.

The regulation should be declared void and its enforcement prohibited, and to that effect this Court should direct that an injunction issue

against the defendant forever restraining his illegal and oppressive acts.

Respectfully submitted,

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Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

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Supreme Court of the United States

OCTOBER TERM, 1918.

No. 228.

STANDARD COMPUTING SCALE COMPANY, LIMITED,
Appellant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York,
Appellee.

BRIEF OF APPELLEE

CHARLES D. NEWTON,
Attorney-General.

EDWARD G. GRIFFIN,
Deputy Attorney-General.

Solicitors for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918 — No. 228.

STANDARD COMPUTING SCALE COMPANY, LIMITED,
Appellant,
(Complainant below),

v.

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York,
Appellee,
(Defendant below).

BRIEF FOR JOHN F. FARRELL AS STATE SUPERINTENDENT OF WEIGHTS AND MEASURES OF THE STATE OF NEW YORK, APPELLEE.

Statement

This appeal comes here directly from the United States District Court for the Southern District of New York. Jurisdiction has heretofore been founded solely on the allegations of unconstitutional acts by the appellee.

A bill of complaint was filed on February 9, 1915. A motion to dismiss for want of equity was made and denied. Answer was filed April 10, 1915. Depositions were taken by the complainant on June 3, 1915 and trial was had before

Hon. Charles M. Hough, D. J., without a jury on December 8, 1915. Further depositions were taken by direction of the Court and a decree filed February 8, 1916, dismissing the suit. The opinion of Judge Hough is found at pages 123–128 of the record.

An appeal was then lodged in United States Circuit Court of Appeals. The Court of Appeals unanimously affirmed the decision of the District Court with opinion. (Printed as an addendum in these points for the convenience of the court.)

The complainant appellant then moved to withdraw the mandate of the Court of Appeals in order that the appeal might be brought here directly, and this motion was granted.

In August, 1914, the Superintendent of Weights and Measures of the State of New York published a printed bulletin of general advice and distributed it among the local officers having to do with weights and measures and dealers throughout the State. That bulletin (Exhibit 1, Record, pages 89–100) contained the following:

> "Specifications.
>
> "Automatic Computing Scales.
>
> "All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance and throughout the whole range of weight graduations." (Record, p. 92.)

The bulletin was published after careful examination and tests of appellant's scale and after hearing his objections (pp. 115–123, 56–64). The appellant's scale did not fulfill this regulation. It is of the regulation he complains, and he

prays for an injunction restraining the appellee and all under his authority from directing prosecutions against owners of the scale, preventing the use of his scale or refusing to seal his scale. (Record, p. 10.)

The defendant-appellee justified his action under authority of the statutes of the State of New York.

Malice or bad faith is not charged in the pleading and none was found on the trial.

POINT I

The administrative authority of the appellee was honestly and reasonably exercised.

The appellant's scale is an "automatic computing combination spring and lever scale." The elements indicated by the designation when used in combination present evils which do not exist in the same degree as where they are incorporated singly in a weighing device.

a. It is an automatic computing scale because it computes the price of the article for the seller and buyer without any independent arithmetical operation after a commodity at a given price per unit is placed upon the machine.

b. It is a spring scale because the load of the article to be weighed stretches a helical coil of steel which in turn operates the drum until it comes to rest opposite a line indicating the weight and price of the article.

c. It is a lever scale because the spring is directly affected by a lever upon which the thing weighed proximately rests.

d. It is a combination scale because this spring and lever are united in the mechanism.

The specification complained of does not apply to simple spring or lever scales or to scales that do not automatically compute prices. The vice is found only where these elements are combined; and these are the reasons for our action.

All spring scales have the fault of varying in accuracy as the spring contracts and expands, through changes in temperature and loses elasticity under increasing loads. In simple spring scales these variations are ordinarily corrected by manually tightening or loosening the spring with a screw set into the spring. This defect is universal in spring scales and concededly exists in the appellant's device.

Where a spring and lever are combined the compensating device need not act directly upon the spring, but as in this case, compensation may be made by moving the attachment of the lever and rack rod so as to increase or diminish the arc through which the lever moves. (Page 65.) This method might not be altogether vicious if the scale were not an automatic computing scale.

When a spring and lever are combined in an automatic computing scale the delicacy and intricacy of the mechanism and the nicety of the reading device justify greater precaution than dependence upon mere human watchfulness in operation. Accordingly an automatic thermostatic device for the purpose of compensating for changes in temperature is prescribed.

The appellant's scale has been shown experimentally to vary from the true, 1¾ ounces in 15 degrees F. change under a 30 pound load. (Dft's Ex. 1, page 119.) Error is shown by appellant's own experiments. (Pltf's Ex. 1, page 115.)

It is apparent that error may increase and multiply in three ways. First, as the elasticity of the spring is affected by increasing weight; second, as the spring expands or contracts under temperature variations; third, as the money graduations on the drum are inscribed closer together in the higher values. In the first and second, error may not be apparent in a five pound load, but certainly increasingly present under a seven pound load and up. The third objection arises because the money graduations in the higher values are necessarily spaced closer, requiring the attachment of a lens through which to read them. Almost imperceptible error in pounds and ounces is therefore automatically registered under money values.

The appellant has sought to correct these intrinsic defects in his scale by providing a device operating directly upon the attachment of the lever and rack rod so as to increase or diminish the arc through which the lever moves. (Shown graphically in appellant's Exhibit D, p. 114 in "cut A, 19.") To operate this the owner must use a screw driver furnished with each scale, and also used for the purpose of making all other adjustments.

Our objections to this manual device are:

1. It may be used by an honest merchant to correct errors arising otherwise than through changes in temperature as:

a. Any error in adjustment.

b. The breaking of the glass pan.

c. To compensate for the weight of paper or of a container placed upon the pan (p. 50).

d. Improper balance.

c. Slowness in operation.

d. Defects arising from injuries to a mechanism of high precision.

e. Its proper operation requires constant vigilance.

2. In the hands of the dishonest it facilitates fraud in that, besides taking advantage of the foregoing:

a. The device is towards the operator and is not easily observed by the customer.

b. Detection of fraud may be instantly avoided upon the approach of an inspector by use of the device.

c. A screw driver is furnished with each scale that operates all of the 31 points of adjustment (appellee's Ex. 8). Coordination is, therefore, easily destroyed and the error concealed by use of the manual thermostat.

Our preference for an automatic thermostat rests upon the following grounds:

a. Its installation gives a fixed factor not to be tampered with except by gross and evident methods.

b. If the automatic thermostat is tampered with the fraud is not easily corrected or concealed.

c. Its operation does not depend upon the vigilance and honesty of the merchant.

d. We have found by our experiments that such a mechanism is practical and accurate.

Administrative action based upon such grounds is, in the absence of malice or bad faith, lawful as an exercise of reasonable discretion with which, we submit, the court should not interfere.

Cumming v. *Board of Education*, 175 U. S. 528.

Throughout the proceeding the appellant has attempted to put a scale known as the " Dayton " upon trial. Much testimony was admitted to show that this scale, although equipped with a thermostat, was not accurate and that the manufacturers of that scale have a patent thermostatic device. We deem all this immaterial. If the Dayton scale is inaccurate, its compliance with the specification will not save its users from prosecution under the statutes quoted *infra*. It does not appear in the record that the appellant ever sought a license under the patent; it does appear that the appellant is not the only maker of scales having defects of similar kind (p. 58). There may not even be inferred from the pleadings or evidence that the appellee acted in collusion with the " Dayton " maker or was actuated by malice or bad faith towards the appellant.

POINT II

The publication of the specification and action under it were legal, because justified by the statutes of the State.

In the opinion of the District Court are dicta to the effect that the appellee is not authorized by the statutes to make any specification whatever. The learned court was, perhaps, misled by our insistence in argument, which we develop here, that the superintendent's powers were supervisory and advisory only. We conceded in the court below that the appellee's powers of enforcement were deficient, yet it never occurred to us that his power to make any rule would be questioned. Had we expected this point to strike the District

Court so forcibly we would have called its attention to the following statute, which is not pleaded nor was it on our brief there. An act was passed by the legislature, effective in April before the specification complained of was formulated, and provided as follows:

> "DEPARTMENT OF WEIGHTS AND MEASURES.
>
> "BULLETINS.
>
> "By chapter five hundred and forty-six of the laws of nineteen hundred and twelve for bulletins of instruction and information to dealers and weights and measures officials, four hundred and eighty dollars and forty-nine cents (re. $480.49)."

[Laws of 1914, Chap. 521, printed in Session Laws of 1914 at page 2093 as part of the Reappropriation Bill of that year.]

This statute supplements the powers of the appellee as laid down in section 11 of the General Business Law of New York. This provides in part:

> "* * * and where not otherwise provided by law he shall have a general supervision of the weights and measures and the weighing and measuring devices of the State and in use in the State. * * * * * * * * * * * * * * *
>
> He or his deputies or inspectors at his direction shall at least once in two years visit the various cities and counties in the State in order to inspect the work of the local sealers, and in the performance of such duty he may inspect the weights, measures, balances or any other weighing or measuring device of any person, firm or corporation."

The powers so conferred are enforced under the following provisions of the Penal Law.

Sec. 2411. Using false weights and measures.—A person who injures or defrauds another by using, with knowledge that the same is false, a false weight, measure or other apparatus, for determining the quantity of any commodity, or article of merchandise, or by knowingly delivering less than the quantity he represents, is guilty of a misdemeanor.

Sec. 2412. Keeping false weights and measures.—A person who retains in his possession any weight or measure, knowing it to be false, unless it appears beyond a reasonable doubt that it was so retained without intent to use it, or permit it to be used in violation of the last section, is guilty of a misdemeanor.

Sec. 2413. False weights and measures authorized to be seized.—A person who is authorized or enjoined by law to arrest another person for a violation of the last two sections, is equally authorized and enjoined to seize any false weights or measures found in the possession of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

Sec. 2414. Weights and measures may be tested by committing magistrate and destroyed or delivered to the district attorney.— The magistrate to whom any weight or measure is delivered pursuant to the last section, must, upon the examination of the defendant, or if the examination is delayed or prevented, without awaiting such examination, cause the same to be tested by comparison with standards conformable to law; and, if he finds it to be false, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to

indictment or trial, as the interests of justice in his judgment require.

Sec. 2414-a. Presumption of knowledge.— The possession or use by any person of any false weight, measure or other apparatus for determining the quantity of any commodity or article of merchandise is presumptive evidence of knowledge by such person of the falsity of such weight, measure or other apparatus.

Sec. 2415. False weights and measures to be destroyed after conviction of offender.— Upon the conviction of the defendant, the district attorney must cause any weight or measure in respect whereof the defendant stands convicted, and which remains in the possession or under the control of the district attorney, to be destroyed.

Sec. 2416. Stamping false weight or tare on casks or packages.— A person who knowingly marks or stamps false or short weights, or false tare on any cask or package, or knowingly sells or offers for sale any cask or package so marked, is guilty of a misdemeanor.

These statutes we contend fully authorized the action of the appellee, so long as he moved within constitutional limitations.

This interpretation of the statutes is, as pointed out in the opinion of the District Court, in accordance with the theory of the bill of complaint.

POINT III.

The appellee's regulation is constitutional.

Congress has not taken over general control of weights and measures, as it is authorized by the Federal Constitution to do. Such jurisdiction as the national government has exercised has been

by concurrent resolution by the establishment of a bureau of standards or collaterally, as in connection with foods and drugs. The regulation of weights and measures, therefore, still rests in the States, as it has since earliest times. In such regulation the acts of officials must of course be within their jurisdiction, and certainly the jurisdiction granted them must have some reasonable connection with the purpose to be achieved.

As we have pointed out in our discussion of the powers of the defendant, he did have jurisdiction granted by the statutes to advise and supervise. We also have shown that his rule is in every way reasonable.

Arguing therefore that jurisdiction to supervise and advise may be granted a State officer in connection with weights and measures, we have to consider whether or not the jurisdiction conferred has any reasonable application to the object intended. We have already discussed the purpose and basis of the rule and we submit that an examination of the exhibits and of the evidence here supports the theory of the specification that a combination spring and lever automatic computing scale without an automatic thermostatic device is inaccurate and easily adapted for the perpetration of fraud.

After all, in this feature of the case the facts forming the basis of the rule are the important thing, and we shall not discuss at length the multitude of cases bearing upon the police power. How far the Federal courts will go in conceding authority to local officers over weights and measures is well known in *Schmidinger* v. *Chicago*, 226 U. S. 579. There the city of Chicago provided

by ordinance that only one-pound loaves of bread should be sold. The bakers contested the measure, alleging that the special requirements of the trade called for the manufacture of bread in various weights, and that a large trade in this article was being destroyed by what seemed to the bakers an arbitrary requirement. Yet the court did not deny the right of the city to standardize this commodity and to forbid sales not of standard sizes. Again, in *Armour & Co.* v. *North Dakota*, 240 U. S. 510, a regulation was made that lard could not be sold in tin pails unless the weight of the pail and the net weight of the lard were marked on the outside of the pail. The court again upheld this regulation upon the ground that there might be a tendency to fraud. It did not require that fraud be shown in every case or that absolute dishonesty or intent to cheat be proved. It was enough to show that fraud might be facilitated to justify the statute. Again in *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, it was held that Mississippi could forbid the sale of a *wholesome* imported product because it had a small amount of malt in it, for the purpose of making prohibition effective. See also *Central Lumber Co.* v. *North Dakota*, 226 U. S. 157.

The discretion granted to public officers in carrying out police power provisions is very broad. This court has said of officers having a broad supervisory power coupled with far more adequate authority than in the case here

> "But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated, and that is, that where Congress has committed to the head

of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involved questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. In the early case of *Decatur* v. *Paulding,* 14 Pet., 497, it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and, as was said by this court in the recent case of *Riverside Oil Co.* v. *Hitchcock,* 190 U. S., 316, 324: 'Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.'" (*Bates & Guild Co.* v. *Payne,* 194 U. S., 106, 108.)

Again, in *National Life Insurance Co. of U. S. of America* v. *National Life Insurance Co.,* 209 U. S., 317, 325, the court said:

"The appeal made by the complainant to the department was really nothing but an appeal to its discretion; complainant could only have asked for the order because, upon the whole, it was thought but fair and equitable that the corporation for which, in a great majority of cases, the letters were probably intended, should have them, although letters so addressed were in a number of cases intended for the corporation named on them. The court is now asked in effect, to review and reverse that order, not because the complainant has a legal right to the delivery of all these letters, but only because, judging from

> the past, the numbers intended for complainant are many more than those intended for defendant, even though all are addressed to the latter. * * * Assuming that the court in some cases has the power to, in effect, review the determination of the department, we do not think there is an occasion for its exercise. The complainant is really appealing from the discretion of the department to the discretion of the court, and the complainant has no clear legal right to obtain the order sought.

See also:

> *Smith* v. *Hitchcock*, 226 U. S. 53.
> *Frick* v. *Lewis*, 233 U. S. 291.
> *People's Bank* v. *Gilson*, 140 Fed. (Mo. Circuit Court) 1.
> *Branahan* v. *Harris*, 189 Fed. (Mo. Circuit) 461.

The complainant insisted again and again over objection and exception in attacking the Dayton scale. This could have no other purpose than to cloud the issues and make this suit in reality a trial of the merits of the Dayton scale. The appellant has chosen to be one of comparatively few manufacturers who make combination spring and lever computing scales, all having as he himself concedes, the defect of variability due to temperature changes. He has either neglected or has been unable to provide an adequate device, which in the judgment of the officer having power to exercise judgment, will properly compensate for the error which he confesses in his scale. That some other manufacturer has struck upon a device which does adequately compensate is irrelevant.

There was some evidence by the witness Osborne for the complainant that the automatic device used by the Dayton Company would not operate as quickly as necessary. It was not shown, however, that it would operate inaccurately, that is it would not bring the indicator back to zero when the indicator was off zero due to other causes than temperature, or that it would hold the indicator on zero when the temperature had caused deflections in the spring.

The appellant has attempted to find significance in the application of the original package cases. It is true that Congress has sole control over interstate commerce but it has granted by acquiescence power over the use of weights and measures to the States. It is true the existence of the specification complained of here and the action of the local officers under it have resulted in some damage to the appellant. However, this restraint upon the sale of the scale does not come because the State of New York forbids shipment by interstate commerce, but because the State of New York, in the exercise of its powers, interferes with their use and operation after sale. The Federal courts have denied to the States the right to prevent oleomargarine from being sold in the original package. It has not denied the right of the State to require that when such oleomargarine is brought into the State it be sold with notice of the nature of the commodity. No one will question that the restrictive legislation of the State of New York and others relative to the use of oleomargarine after it is brought into the jurisdiction, results in great pecuniary damage to the manufacturers of the product. But it is not to be effectively argued that the use of oleomargarine in

New York after its shipment may not be restricted, where not actually forbidden. The appellant's analogy under the *Scholenberger* and *Powel* cases is lame.

However, we must remember that if the oleomargarine cases have any application it would be because there a *wholesome* product was being carried in interstate commerce and was denied sale in the State. We assert the scale here is defective and dishonest.

The act of the appellee here being presumptively valid, the appellant, of course, has the burden of showing that this scale is in every way a proper scale and that it is not designed to facilitate fraud. This simply takes us back to our original proposition — that under the Constitution of the United States, the rule of the appellee in making the classification he does, is an honest exercise of the discretion given him by law. As Judge Hough points out there is a basis for the rule on the grounds that we have enumerated previously. The appellant must first show that there has been an abuse of or dishonest use of discretion in the making of the rule. If this be established the application of the interstate commerce clause would be unimportant and superfluous.

POINT IV

The appellant has mistaken its remedy.

The appellant before this appeal came here has sought unsuccessfully two other remedies.

It first applied to the Supreme Court of New York for a writ of mandamus to compel the Commissioner of Weights and Measures of the City of

New York to serialize and approve his scale. This remedy was denied at Special Term. (The opinion of the Special Term, reported in the New York Law Journal, May 25, 1915, is printed as an addendum to this brief for the convenience of the court.) An appeal was taken to the intermediate appellate court (Supreme Court, Appellate Division, First Department), where the order was reversed without opinion, with a direction that an alternative writ of mandamus issue, 170 App. Div. (N. Y.) 978. The case has proceeded no further. While the appeal in this court was pending the appellant sued the appellee for $100,000 in damages. Answer was interposed and we moved for judgment on the pleadings. Our motion was granted by the Albany Special Term of the Supreme Court without opinion. An appeal from that order is now pending in the Appellate Division, Third Department. It is only fair to say that the undisturbed opinions of the United States District Court and Circuit Court of Appeals probably contributed to the result.

The record shows that only once had the appellee taken any direct action in regard to the appellant's scale in the hands of users. The appellee's subordinate, Mr. Dasney, marked one scale owned by Mr. George B. May "slow and faulty" (p. 101). The appellant is mistaken in his statement at page 38 of his brief that there were three such occasions participated in by the appellee's inspectors.

The chief complaint, however, lies in the promulgation of the specification. Indeed there is little to show that the superintendent intends to make any other rule or to take any further action

against the appellant. In practical effect the appellant now desires three things, two affirmative and the other negative.

A. That local sealers whom the appellee does not appoint and does not remove be required to seal and approve its scale.

B. That users be protected from prosecution.

C. That the specification be set aside.

As to the first, local sealers are not joined here and the record shows at pages 21–43 that the local sealers are not as a matter of law and fact always controlled by the appellee. Further the relief prayed for would require at least a mandatory injunction operating against officers who are not parties to this suit.

As to the second, the relief, if granted, would not operate directly against the various local officers whose duty it is, and private persons whose right it is to initiate prosecutions.

As to the offending specification it has already been published and has worked its harm to the appellant. Shall the appellee be required by injunction to withdraw it and issue a specification approving the scale?

Each county and city has a sealer of weights and measures. There are sixty and more counties in the State and some fifty-seven cities. In the City of New York there is a Mayor's Commissioner of Weights and Measures, who has a very broad and special authority denied or withheld from local sealers elsewhere, and this may be the case under other charters. The Superintendent of Weights and Measures does not appoint the local sealers. He may not remove them. They are appointed and removed in each instance by local

authority. He is required annually under section 11 of the General Business Law to report generally to the Legislature in regard to weights and measures throughout the State. Undoubtedly he shares with every citizen the right to recommend to the local authorities his opinions and views with regard to the work of their subordinates; there, however, his direct authority ends.

Now, let us determine the purpose of the rule in the consideration of whether or not it should be suppressed by mandatory injunction. As we have above shown, the superintendent has general supervision over the weighing and measuring devices in use in this State, and he may inspect the weighing appliances of any firm, person or corporation in the State. Does the mere formulation of a rule mean that the type of scale denounced by it may not be used? Is there any power given to the superintendent to, by his own act, suppress the use of a scale? No, that power is in the local officers; the district attorney and the local sealer, who are required to prosecute. The suppression of such a scale can only be brought about in a criminal action. The formulation of this rule and its promulgation is authorized in legislative bills appropriating money, and is therefore a mere declaration of his policy and instructions. The Court may take judicial notice of the fact that there are held within the State conventions of sealers of weights and measures, and at Washington every year there is held by the Bureau of Standards a convention of State weights and measures officials throughout the Union. At such times resolutions are adopted, speeches made and policies outlined which in

many instances result in detriment to manufacturers of appliances which are not approved, or which are condemned. As we have emphasized, the defendant here has power to go throughout the State and inspect anybody's weighing apparatus. The power to inspect must mean something. It can only mean under the peculiar provisions of our statute law that after inspection, the defendant not being dumb, will say what he thinks, and classify the scale as a good or a bad one; and we have no doubt whatever that a statement of such high authority on weights and measures, expressed to a merchant, might cause him to fear that if he were prosecuted in a court, a judge or jury might be inclined to adopt the opinion of the superintendent. Resultant damage there would be through this expression of opinion but no legal damage which the court should *prevent*. It is true that such expression of opinion becomes a rule when sent out in a bulletin authorized by law, as is not ordinarily true of a conversation in a grocery store. We make no claim that this expression of opinion is not, to some extent, harmful to the plaintiff, as an expression of approval, written or oral, would be of advantage to him in his sales.

If it be true that the *act*, based upon the opinion, of withholding the seal is harmful to the plaintiff, then let him have his recourse to an action at law requiring that the seal be placed upon his scale, if, in law, it be required. But in this case, we have only an attempt to control the operation of Mr. Farrell's mind, in examining and giving expression to the merits of a particular scale. If the superintendent be mistaken,

he acts at his peril in seizing or suppressing the scale or in bringing men into court for using a scale of which he has disapproved. However, as long as the Legislature has seen fit to give him the power of examination and criticism, his *honest* expression of opinion should not be denied him by the courts.

And, we desire to point out at this time, that even if the plaintiff in another proceeding were successful in requiring local sealers to seal his scale, the rule would still lawfully stand. The superintendent would not be denied the right to express his opinion by specification or otherwise that the user of such scale should be prosecuted.

The situation disclosed here is not entirely new, as might be thought, for the Supreme Judicial Court of Massachusetts has had occasion to pass upon the question in *Moneyweight Scale Co.* v. *McBride*, 199 Mass. 503. In that case the court had to consider the acts of 354 sealers of weights and measures of Massachusetts. There the statute not only gave the right to approve, but the right to *condemn*, yet the court withheld injunctive relief and pointed out that mandamus was the proper remedy in an action of this kind.

This power to supervise and instruct inferior local officers is not unusual in state officials. The Attorney-General is continually called upon for opinions by administrative officers and in some cases, in the absence of judicial authority to the contrary, these opinions are given controlling weight. For instance, in the year 1915, the Attorney-General rendered some seven opinions relative to the legality of bonds of great railroads

and other corporations as investments for savings banks. Unquestionably when these opinions were adverse to the legality of these bonds their market value within the State of New York was injured. Yet, it would be surprising indeed, if a railroad company could come into equity in this State and enjoin the opinion of the Attorney-General declaring its bonds illegal as investments for banks. The State Board of Tax Commissioners is continually formulating rules under the sanction of statute for local assessors. Probably, in the course of human events, erroneous advice may some time be given and property, as a result thereof, may be illegally assessed. Yet, does an action lie to restrain the formulation and publication of a particular instruction sent to local officers, whom the State Tax Commission cannot remove or discipline directly? These advisory and supervisory powers are exercised likewise by the State Superintendent of Elections, by the State Health Department, by the Labor Department, by the Department of Agriculture, etc. No one will question that the regulation or instructions sanctioned by one of the departments of State government may damage any property interest that it affects adversely; yet, we have never heard of a case where equity attempted to strike at the *instruction or advice itself*. Always the powers of the courts have been used to control the act of a particular officer charged with the performance of a duty in carrying out the instruction, opinion or advice.

CONCLUSION

The decree of the District Court should be affirmed.

Respectfully submitted,
CHARLES D. NEWTON,
Attorney-General
and Solicitor for the Appellee.

EDWARD G. GRIFFIN,
Deputy Attorney-General,
Of Counsel.

ADDENDA

1

Supreme Court, New York County.
People ex rel. Standard Computing Scale Co., Lim., v. Hartigan.

WEEKS, J.:

The relator moves for a writ of mandamus to compel the Commissioner of Weights and Measures of the City of New York to approve relator's weighing scale and to grant relator a serial number therefor to enable it to sell same in the city. After careful testing and research by the bureau of weights and measures to determine the most reliable scales for the protection of both merchants and the public in regard to correct weights and corresponding prices to be paid therefor, the bureau has approved, among other kind, a class of scale known as the combined lever and spring-actuated computing weighing machine, which indicates the weight of the commodity and the price to be paid therefor. The bureau has also determined that among this class of scales the only

ones which could be considered reliable were those equipped with an automatic compensating device controlling the variations in the machine's springs due to change in temperature, and in order to protect the public the commissioner has determined that all computing scales should have thereon such an automatic compensating device, and has promulgated the following rule: "Article IX. Adopted June 7, 1913. Automatic compensating device. Spring, or combined spring and lever weighing machines, which indicate money value of commodities weighed, must be equipped with automatic compensating devices to control variations in prices due to changes in temperature." This regulation was adopted, it is claimed by the respondent, solely to inform the scale makers of the essentials required in such a scale by the commissioner before he would give his approval to scales of this character. It is conceded that the relator's scale does not conform to these essentials in that its device designed to correct changes in its scales resulting from changes in temperature, is not automatic, but on the contrary requires the aid of a screwdriver applied to a certain screw contained in its scale. The relator asserts that this rule is unconstitutional and void upon the theory that it is an unjustifiable exercise of the police powers, and cities *Ives* v. *The South Buffalo R'y* (201 N. Y. 271, etc.), but states that there is no imputation of unlawful or improper motive on the part of respondent. Relator claims that the effect of the rule is damaging to its business, which is lawful, and the prosecution of which is secured to it by the Constitutions of New York and of the United States. Relator asserts that

section 384-a of the Code of Ordinances of the Greater New York Charter is invalid in so far as it provides for the approval and serialization of all scales sold in the city before their use is allowed. Relator further contends that Rule IX " does not benefit the public, it benefits one individual scale company only, which possesses an exclusive patent covering the device which Rule IX prescribes, giving to such company an exclusive monopoly in the City of New York," and relator further characterizes same as " vicious class legislation." I do not think the Ives case bears upon or controls a case of this kind. The very excerpt cited by the relator sustains the position of the respondent. Neither the liberty of relator nor its property rights are in any way invaded or interfered with. Relator is free to conform to the reasonable and just requirements demanded by the respondent. Relator is not precluded by the patent laws from devising a new way to automatically compensate for the changes of temperature as they affect his scale; relator is apprised by respondent that if he will remove the price computing device approval will be granted to its scale, the fineness and accuracy of which, in other respects, is admitted. It is apparent that the relator seeks, by mandate of the court, to deprive a competitor of an advantage secured by superior mechanical inventiveness, which advantage inures to the benefit of all the public. This court will refuse to support the relator in this motion. This refusal is predicated upon the following grounds: 1. The respondent, as commissioner of weights and measures, is within his authority in refusing to approve and

serialize relator's scale. The bureau of weights and measures is created by section 380 of chapter 8 of the Code of Ordinances of the City of New York, now known as chapter 26, section 1, of the ordinances adopted by the board of aldermen on March 23, 1915, and approved by the mayor on March 29, 1915, which reads as follows: "There shall be a mayor's bureau of weights and measures in the City of New York, in charge of a commissioner of weights and measures, to be appointed by the mayor and removable by him at pleasure * * * ." Section 384-a, in effect September 1, 1911, now known as section 12 of chapter 28, is as follows: "Section 12 (384-a). Sale of weights and measures. No person shall sell * * * any weights, scales, * * * intended to be used for the purchase or sale of any commodity * * * until a type or types of the said weight scales * * * with specifications as to construction, shall have been submitted to and approved by the commissioner of weights and measures. The commissioner shall, when said types are approved, designate a serial number, which serial number shall be used in identifying the type approved. * * * no person shall sell any * * * scale * * * intended to be used for the purchase or sale of any commodity * * * that does not comply with the specifications or type submitted and approved by the commissioner, as provided in this section. * * * The commissioner shall keep a register * * * and such record shall be open to the inspection of the public at all reasonable times." Such a regulation is constitutional (*People ex rel. Gould* v. *City of Rochester*, 45 Hun, 102; *City of New York* v.

Marca, 58 Misc. 225). It cannot be said that respondent's refusal to approve relator's scale was a gross abuse of the discretionary power vested in respondent. It has been held that the granting of licenses for certain businesses, particularly the granting of theatrical licenses, by a city official is discretionary and that the courts will not interfere (*People ex rel. Rota* v. *Baker,* 136 A. D. 7; *People ex rel. Armstrong* v. *Murphy,* 65 id. 123; *People ex rel. Worth* v. *Grant,* 58 Hun, 155; *People ex rel. Park Circle Co.* v. *Board of Police,* 36 Misc. 89). The court has no power to control the discretion which the law has placed in the commissioner of weights and measures. This principle is clearly enunciated in *Friel* v. *McAdoo* (101 A. D. 155, affd. 181 N. Y. 558). To permit the relator in such a case as this to go over the head of the commissioner of weights and measures, where he has exercised his discretion for the good of the public at large, as is quite apparent from the conceded facts in this case, would be to transfer to the courts the exercise of those executive functions which have by law been reposed in the commissioner himself. The affidavits of relator which were not served with the order to show cause are objected to by the respondent and for that reason have not been considered (Code Civ. Pro., sec. 2070; *People ex rel. Melledy* v. *Shea,* 73 A. D. 237; *People ex rel. Brennan* v. *Haffen,* 104 id. 230). The motion for mandamus is therefore denied, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

STANDARD COMPUTING SCALE COMPANY,
Complainant-Appellant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York,
Defendant-Appellee.

Before Coxe, Ward and Rogers, Circuit Judges.

Wellman, Gooch, and Smyth, for complainant-appellant.

E. G. Griffin, Deputy Attorney-General and E. E. Woodbury, Attorney-General, for defendant-appellee.

WARD, Circuit Judge.—The defendant, as State Superintendent of Weights and Measures, has issued to the county and city sealers of weights and measures throughout the State of New York the following regulation:

> "AUTOMATIC COMPUTING SCALES.
>
> "All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance and throughout the whole range of weight graduations."

The Attorney-General of New York representing the defendant, contends that he had authority to issue this regulation under the following pro-

vision of section 11 of the General Business Law of the State of New York:

> "* * * and where not otherwise provided by law he shall have a general supervision of the weights and measures and the weighing and measuring devices of the State and in use in the State."

The complainant treats the regulation as authorized by the State, but contends that it is invalid because it violates the Fourteenth Amendment to the Constitution. Other objections to the effect that it impairs the obligations of contracts and is a regulation of commerce we will not consider.

A preliminary question to be disposed of is as to the jurisdiction of the District Court. Section 24, subdivision 1 of the Judicial Code gives the District Court jurisdiction of all civil suits, where the matter in controversy exceeds exclusive of interest and costs the sum or value of $3,000, which arise under the Constitution or laws of the United States. No consideration of the citizenship of the parties is involved in this category.

The present is a cause arising under the Fourteenth Amendment of the Constitution. There is, however, no allegation in the bill as to the value of the matter in controversy. That matter is the regulation in question. The relief prayed for is among other things that the regulation be declared invalid as in violation of the Fourteenth Amendment, that the defendant, his deputies, etc., be restrained from directing users of the complainant's scales to be prosecuted or to be prevented from using the scales and from directing the county and city sealers to refuse to seal the scales.

No objection was made in the District Court to the bill on the ground that the value of the matter in controversy was not stated to be over $3,000 exclusive of interest and costs. As it could have been amended there, it seems that we are not obliged to take this objection in this court, *Giles* v. *Harris*, 189 U. S. 475, 485, and dissenting opinion of Harlan, J., who vigorously contended, that such omission was fatal to the jurisdiction.

Be this as it may, it would seem that the District Court had jurisdiction without reference to the sum or value of the matter in controversy under subdivision 14, which reads:

> "Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, or any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

We think that it is quite clear that there is jurisdiction to enjoin an officer from acting under an unconstitutional statute or regulation of the State which violates the constitutional rights of the complainant. This seems to have been settled though not without vigorous dissent in *Poindexter* v. *Greenhow*, 114 U. S. 270. The objection that under the Eleventh Amendment of the Constitution the judicial power of the United States shall not extend to any suit at law or in equity against one of the United States was answered by saying that

an unconstitutional law or regulation is a non-existing thing. See also *Davis* v. *Gray,* 16 Wall. 203, 220; *Cotting* v. *Kansas City Stock Yards,* 183 U. S. 79; and *Ex parte Young,* 209 U. S. 123, 159.

All spring scales and all spring and lever scales and all computing spring scales which do not also use a lever are affected by changes in temperature. Cold tends to stiffen the spring and make the scale show less than the correct weight, while heat relaxes it and tends to make it show a greater than the correct weight. The computation of price feature has nothing whatever to do with the accuracy of the scale. The computing scale indicates automatically the price of the articles weighed just as in the case of all other scales the merchant calculates it mentally with reference to the weight shown by the scale.

The only existing automatic thermostatic regulating device is patented and belongs to the Computing Scale Company of Dayton, Ohio, which manufactures a computing scale with an automatic thermostat and the only automatic combined spring and lever computing scale competing with it is the complainant's scale, which has a mechanical thermostat.

The complainant's business is property. It is admitted by the defendant that the effect of this regulation has been to injure, if not to totally destroy it in the State of New York. One can easily see why this is likely to be so. Many of the sealers in consequence of the regulation refuse to seal the complainant's scales; purchasers of the same on the instalment plan refuse to pay instalments as they fall due; customers distrust a scale which the State officials will not certify and merchants do not care to buy it.

The defendant's objection to the complainant's scale is not that it is inaccurate or incapable of being kept accurate. On the contrary, the district judge has found that it is an excellent instrument and that its mechanical thermostat is even better than the automatic thermostat. The objection is that it is more capable of being fraudulently altered mechanically by a dishonest merchant than is a scale having an automatic thermostat. Any and all scales are capable of being fraudulently tampered with. The complainant contends that even if the defendant had the right to prevent as far as possible scales being used in the State of New York which though accurate can easily be made to cheat, he has not done this, but subjects only computing spring and lever scales to the regulation, while leaving all other scales free. This is said to be an arbitrary and unreasonable classification which violates the Fourteenth Amendment of the Constitution to the prejudice of the complainant because it deprives it of the equal protection of the laws.

We regard the regulation as an exercise of the police power of the State for the protection of the public. How far such a power shall be exercised and how much of any particular field shall be regulated is a matter of the public policy of the State. Whether we agree with it or not is of no importance. In *Central Lumber Co.* v. *Dakota*, 226 U. S. 157, 160, Mr. Justice Holmes said:

> " On the first of these points it is said that an indefensible classification may be disguised in the form of a description of the acts constituting the offence, and it is urged that to punish selling goods in one place lower

than at another in effect is to select the class of dealers that have two places of business for a special liability, and in real fact is a blow aimed at those who have several lumber yards along a line of railroad, in the interest of independent dealers. All competition, it is added, imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place. The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81; *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205.

And in *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 516, Mr. Justice McKenna said:

"The equal protection clause of the Fourteenth Amendment is invoked by the Armour Company and the specification is that the law under review 'arbitrarily and without reasonable ground therefor singles out lard from all food products' which are sold in packages, such as 'prints of butter, packages of coffee, boxes of crackers, and the endless number of other products sold in package form are not included, and no natural and reasonable ground for excluding them and in singling out lard has been suggested.'

> "The range of discretion that a State possesses in classifying objects of legislation we may be excused from expressing, in view of very recent decisions. The power may be determined by degrees of evil or exercised in cases where detriment is specially experienced. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 161. The law of North Dakota does not exceed this power."

The decree is affirmed.

Supreme Court of the United States

OCTOBER TERM, 1913

No. 488

STANDARD COMPUTING SCALE COMPANY, LIMITED,
Complainant-Appellant,

against

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York,
Defendant-Appellee.

SUPPLEMENTAL BRIEF FOR STANDARD COMPUTING SCALE COMPANY, LIMITED, APPELLANT.

HERBERT C. SMYTH,
FREDERIC C. SCOFIELD,
FREDERICK W. BISGOOD,
Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1918—No. 228.

STANDARD COMPUTING SCALE COMPANY, LIMITED.
Appellant,
(Complainant below),

AGAINST

JOHN F. FARRELL, as State Superintendent of Weights and Measures of the State of New York,
Appellee,
(Defendant below).

SUPPLEMENTAL BRIEF FOR STANDARD COMPUTING SCALE COMPANY, LIMITED, APPELLANT.

Statement.

Three topics are discussed in this brief, the purpose of which is to bring out a few salient features not fully discussed in our main argument.

Summary of Argument.

POINT I.

The appeal to the Circuit Court of Appeals.

POINT II.

The due process of law clause in the 14th amendment to the Constitution.

POINT III.

The equal protection of the law clause in the 14th amendment to the constitution.

POINT I.

The appeal to the Circuit Court of Appeals.

Reference is made by the defendant to an appeal heretofore prosecuted to the Circuit Court of Appeals and the opinion of that Court is printed in full in his brief.

The Circuit Court of Appeals, at our instance, withdrew the mandate to the District Court and dismissed the appeal for lack of jurisdiction subsequent to the filing of their opinion. As the jurisdiction of the District Court was invoked solely upon the question of the unconstitutionality of the defendant's rule, the Circuit Court of Appeals had no jurisdiction.

> *Union & P. Bank* v. *Memphis*, 189 U. S. 71;
>
> *Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305.

Appellee, in his brief, sets forth in detail his reasons for the promulgation of the rule complained of and his objections to complainant's scale.

These objections will be discussed, first, with respect to our contention that the defendant's regulation deprives complainant of its property without due process of law, and, secondly, with respect to our contention that the regulation denies to complainant the equal protection of the law.

POINT II.

The due process of law clause in the 14th amendment to the Constitution.

Our argument here is based upon the proposition that the deprivation of property rights under an exercise of the police power can only be accomplished when the means used are necessary to the public welfare and are reasonable, not arbitrary nor capricious.

Defendant concedes that his procedure can not be sustained if not within this category, but urges that administrative action, based upon the grounds recited, is a reasonable exercise of discretion with which the Court should not interfere.

The first class of objections are all predicated upon the use of the scale, by an *honest* dealer, to correct errors arising otherwise than through changes in temperature and elasticity.

So far as changes due to elasticity are concerned, defendant's expert, Reichmann, testified, that:

> "Within the intended limits of operation of an ordinary commercial scale, the change of tensility, so to speak, of a steel spring owing to changes in temperature, is not important, but is the same with different springs made at different times. In other words, there is not enough variation. In other words, the product of manufacture is sufficiently constant" (p. 54).

Variation in elasticity, however, is not in issue for neither complainant's device nor the automatic device demonstrated to the Court purport to provide for this change, though defendant assumes

that the manual device is an efficient one for that purpose.

We will enter into a discussion of these objections.

The District Court found that "in the hands of an *honest* and even *reasonably* intelligent owner" complainant's scale was "as good, and more easily corrected than a machine containing an automatic device" (p. 125), and the judges of the Circuit Court of Appeals were of like opinion.

Defendant's own expert, Reichmann, paid to testify in the case (p. 82), did not agree with his employer that an automatic device was a necessary or even a fair and reasonable requirement (p. 83). He stated, both in an *ante litem* letter to the complainant's agent, Palmer (Exhibit E, p. 115), and upon the trial (p. 83) that "the requirements of an automatic thermostat on the lever cannot be an essential objection as it is one which no honest or fair-minded official has a right to require". His letter recognized the monopolistic abuse which would result from the rule. He wrote, "the requirement of such a device would be limiting the scale to a single patent, which of course is unscrupulous. I have, in my administration of office, always fought any such favoritism".

Reichmann was defendant's predecessor in office and had been State Superintendent of Weights and Measures for six years. Prior to that, he had been technical expert for an instrument concern in Chicago manufacturing scientific instruments, instruments of precision (p. 53). Defendant was by profession a lawyer (p. 60).

But upon the trial the defendant expressly dis-

claimed that these were the objections which he had to the complainant's scale. At page 61 he said:

> "My objection to the complainant's mechanical device *is not* that it may be used for some purpose other then temperature regulations."

We think that this disposes of all objections to the scale in the hands of an honest dealer.

The second class of objections are those urged against the scale when used by an unscrupulous dealer.

The first objection is that the manual device "is towards the operator and is not easily observed by the cutomer". The absurdity of this argument lies in the fact that if the device *were* turned towards the customer *the scale would still fail to comply with the regulation.*

Complainant is quite willing to alter the construction of its scale so as to obviate this objection. That may be done without infringing the patent rights of any other company, but this change would not permit the use of the scale in the State of New York. We are contesting an enactment *prohibiting* mechanical temperature compensating devices, not one *regulating* the position of such a device with relation to the dealer and the customer.

The second objection is that "detection of fraud may be instantly avoided upon the approach of an inspector by use of the manual device".

Defendant and his expert testified to the ease with which an inspector might be deceived (pp. 61 and 75). Defendant, however, admitted that to manipulate the scale, a cap first had to be unscrewed with a screwdriver and the screwdriver inserted in order to manipulate the inside workings.

The manipulation described by Reichmann, which that gentleman asserts can be accomplished "*very*

readily", consists of taking a wrench and raising the point of support of the springs and then adjusting the zero reading.

Aside from the fact that raising the point of support of the springs would shorten the travel on the rack rod and thus cheat the dealer, not the customer, it is apparent that this alleged simple manipulation detailed by Mr. Reichmann is, in fact, a delicate and time consuming process, which in the absence of an inspector, who, contrary to the custom of his kind, announces his coming in advance, would be an experiment extremely hazardous to the continued liberty of the offending dealer.

Complainant's witness, Osborne, testified that complainant's scale was so designed that a fraudulent manipulation thereof would be easily detected by an inspector (p. 51). That is was necessary to use a screwdriver in two places and a wrench in another place (p. 52). Osborne pointed out a more convenient method of manipulating the scale demonstrated to the Court which was equipped with an automatic device (p. 52).

As has been said concerning defendant's objection that the manual thermostat was turned toward the dealer and invisible to the customer, the alleged fault described in his second objection under this class, is not necessarily applicable to manual devices. A scale might be constructed so that ready manipulation would be impossible and still employ the use of a mechanical compensating device.

The third objection is that "a screwdriver is furnished with each scale that operates all of the 31 points of adjustment, co-ordination is, therefore, easily destroyed and an error concealed by the use of the manual thermostat".

Here, also, the fault complained of is one not

peculiar to scales containing a manual thermostat. The failure to supply the screwdriver with scales sold by the complainant would not allow the use of the scale. A statute or regulation forbidding, under severe penalty, the use or possession of an instrument such as a screwdriver or wrench which might be used to perpetrate a fraud by the owner or user of a computing scale or any other scale, would tend to prevent this third alleged evil, not a regulation prescribing an automatic compensating device.

The operation of changing these 31 points of adjustment was not described to the Court, but we imagine that such a process would be a difficult and lengthy one which would obviate the other objection previously asserted, that "detection of fraud may be instantly avoided".

The cases cited by defendant as authority for the proposition that the Court should not interfere with the exercise of his discretion are not analagous to the case at bar.

Cumming v. *Board of Education*, 175 U. S. 528, was an application made by certain colored citizens of Georgia for an injunction to restrain the County Board of Education from discriminating against the colored population in provisions made for the high school education of the youth of Georgia, and to restrain the tax collector of the County from the collection of a tax imposed upon them to be appropriated for the education of white high school scholars. It appeared that certain high schools had been established in the County of Richmond, and that one of such schools was the Ware High School which was open to those of the colored race. Two high schools for whites existed in the county where tuition fees were charged. These schools were maintained only partially at public expense.

The Ware High School for colored people had been discontinued and the complainant alleged that the only other high schools open to the colored race were sectarian and charged tuition fees. It appeared that the Board had not sufficient funds for the maintenance of the Ware High School and at the same time for primary schools for colored children. It was shown upon the trial that the Ware High School had been discontinued for the reason that only sixty pupils attended there and that the building had been used to accommodate 200 colored pupils in the rudiments of education. The action of the Board was predicated upon the opinion of its members that "it would be unwise and unconscionable to keep up a high school for sixty pupils and turn away three hundred little negroes who are asking to be taught their alphabet and to read and write".

It was shown that no part of the funds of the Board accrued or accruing and no property appropriate to the education of the negro race had been taken from them.

The Court held that the action of the Board was reasonable and that its ruling did not deny to the complainants the equal protection of the laws.

In *Schmidinger* v. *Chicago*, 226 U. S. 578, an ordinance of the City of Chicago was attacked which provided that every loaf of bread made for sale, sold, or offered or exposed for sale in the City of Chicago should weigh a pound avoirdupois, and such loaf should be considered the standard loaf of the City of Chicago. Bread also might be made or sold in half, three-quarters, double, triple, quadruple, quintuple or sextuple loaves, and in no other way. All loaves were required to be marked with a label stating their weight in pounds or fractions

of a pound. The act provided for a fine of from $10 to $100 for violations of the ordinance.

The plaintiff-in-error contended that the prohibition against loaves such as were in demand at the time the ordinance was passed and in weights necessary to satisfy business requirements and labeled in accordance with their exact weight, thus obviating any fraud, unreasonably, arbitrarily and unnecessarily interfered with legitimate pursuit of a useful business, and deprived plaintiff-in-error of liberty and property without due process of law.

In the Supreme Court of Illinois, to which the writ of error in this case was directed, Schmidinger had further contended that the ordinance violated the clause of the 14th Amendment guaranteeing equal protection of the laws. This contention was abandoned in the Supreme Court.

The Supreme Court of the United States held that the ordinance was a valid exercise of the police power of the state and was not so purely arbitrary and unreasonable as to require the intervention of the courts. The principal contention of the plaintiff-in-error was that a compliance with the ordinance would subject the bakers in the city to serious inconvenience. In the opinion of the Supreme Court, Mr. Justice Day said at pages 588, 589:

> "and it is urged that to make a loaf of the standard size of 1 pound, as required by the ordinance, would be extremely inconvenient at least, owing to changes and evaporation after the loaf is baked, and that to insure a loaf of full standard size it would be necessary to use twenty ounces of dough. But inconveniences of this kind do not vitiate the exercise of legislative power. The local legislature is presumed to know what will be of the most benefit to the whole body of citizens. Evi-

dently, the council of the City of Chicago has acted with the belief that a full pound loaf, with the variations provided, would furnish the best standard. It has not fixed the price at which bread may be sold. It has only prescribed that the standard weight must be found in the loaves of the sizes authorized."

The Court pointed out that thousands of transactions of bread in the city of Chicago were with people who bought in small quantities and that the act was designed to secure loaves of full weight for these people. It was said at page 589:

"We cannot say that the fixing of these standards in the exercise of the legislative discretion of the council is such an unreasonable and arbitrary exercise of the police power as to bring the case within the rare class in which this court may declare such legislation void because of the provisions of the 14th amendment to the Constitution of the United States, securing due process of law from deprivation by state enactments."

It was further contended that the ordinance in question interfered with the liberty of contract of the plaintiff-in-error. In answer to this contention the Court said at pages 589 and 590:

"The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of the general welfare. So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body, and is not so arbitrary or capricious as to be a depriva-

> tion of due process of law, freedom of contract is not interfered with in a constitutional sense."

In *Purity Extract & Tonic Co.* vs. *Lynch*, 226 U. S. 192, it was held that the statute of Mississippi which prohibited the sale in that state of any malt liquor was not so unreasonable as to require the intervention of the Court, and that if the legislature, in the exercise of an honest discretion, believed that a prohibition against non-intoxicating malt liquor was necessary to make effective a statute prohibiting the sale of alcoholic beverages, such statute was not open to the objection that it would tend to deprive of their property, without due process of law, persons having property rights in the harmless malt beverages prohibited.

Bates & Gill Co. vs. *Payne*, 194 U. S. 106, was an action to compel the Postmaster General to admit to the mails as second class mail matter a certain publication which he contended was not entitled to such classification. The Postmaster held that this publication was not a monthly magazine or periodical but that it in fact was a complete book in itself having no relation to those preceding it. This case did not arise under the Constitution and the Court held that it would not interfere with the discretion of the Postmaster General in the absence of a showing that such discretion was arbitrarily exercised.

In *National Life Insurance Co. of the U. S. of America* vs. *National Life Insurance Company*, 209 U. S. 317, the complainant sought to restrain the defendant insurance company from receiving mail and to compel the Postmaster General at Chicago to deliver mail to complainant addressed sim-

ply "National Life Insurance Company, Chicago, Ills."

It was alleged that a great majority of the mail so addressed, though intended for the complainant, was delivered to the defendant.

It appeared that quantities of the mail addressed as above described and delivered to the defendant was in fact intended for the defendant insurance Company.

Upon all the facts in the case the Court held that the refusal of the Chicago Postmaster was based upon reasonable grounds. No constitutional point was presented or urged.

Smith v. *Hitchcock*, 226 U. S. 53, was a case which attacked the ruling of the Postmaster General in refusing to transmit as second class mail matter certain periodicals which though published weekly contained but a single story complete in itself. It was held that the ruling of the Postmaster General was not so arbitrary and unreasonable as to require the intervention of the Court. No constitutional point was raised.

In *People's Bank* v. *Gilson*, 140 Federal 1, the complainant brought a bill in equity seeking to compel the defendant Gilson who was in charge of a branch post office in St. Louis to receive mail contrary to a ruling that the mail was of so fraudulent a character as to be an improper subject of transmission through the mails. Here again, no constitutional question was raised and the Court found the action of the defendant reasonable.

Branaman v. *Harris*, 189 Federal 461, was another case where the post office authorities had refused the use of the mails to the complainant on the ground that the use made was a fraudulent one.

The Court refused to interfere with the defendant's discretion.

It should not be understood from these decisions that discretionary action is never reviewable in the courts.

In the case of *American School of Magnetic Healing* vs. *McAnnulty*, 187 U. S. 94, the United States Supreme Court reversed a decree dismissing an appeal to enjoin a Postmaster from carrying out an order of the Postmaster General directing the retention of letters addressed to complainant. Although in this case the Court recognized the rule that an administrative department of the government would not be coerced by the courts, it stated the exception that such action must be reasonable.

At pages 109 and 110 the Court said:

> "That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necesarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials of that department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." * * *
>
> "The facts, which are here admitted of record, show that the case is not one which, by any construction of those facts, is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the the courts, therefore must have power in a proper proceeding to grant relief. *Otherwise the individual is left to the absolutely uncon-*

> *trolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law*, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld." (Italics ours.)

In *Frick* v. *Lewis*, 195 Federal 693, affirmed in the Supreme Court of the United States, 233 U. S. 291, the petitioner sued out a writ of *habeas corpus* to discharge him from custody, and to review a ruling of the Secretary of Commerce and Labor decreeing his deportation upon the charge that he had caused a woman to be imported into the United States from Canada. Petitioner avowed that this woman was his wife.

A few days after the lady came to the United States the petitioner was arrested under an Immigration Statute for procuring, importing and bringing into the United States a woman for an immoral purpose. He was afterwards indicted in the United States District Court on a charge of violation of the same act and after trial was found not guilty. The Immigration Authorities after a hearing conducted in accordance with the recognized practice decided that the petitioner had been guilty of a violation of the act for which he was tried.

The United States Supreme Court held that the finding of not guilty by the Criminal Court was not binding upon the Immigration Authorities, that if there was *some* evidence of the guilt of petitioner the Board was justified in decreeing his deportation and that the Court would not interfere with the findings of fact of the Immigration Au-

thorities or their discretion exercised after a hearing duly had.

The most drastic enactment considered by this Court appears to be the ordinance which was attacked in the *Schmidinger* case where the weight of loaves of bread was regulated.

We can think of no commodity more properly a subject of police regulation. In the City of Chicago hundreds of thousands of people purchase bread in small quantities. To some, two ounces of bread is not a matter of great concern, but to a great multitude, two ounces of bread, an eighth of a loaf, means the bread ration of one person for one day or at least one meal. This latter class was the class to be protected. In the purchase of their bread they would scarcely observe a difference of two ounces in loaves sold by different dealers, therefore their purchases would be improvident and uneconomical, and they would not have sufficient business sagacity to perceive their error.

The principal contention of plaintiff-in-error was the inconvenience and hardship of a compliance with the ordinance. But the situation was one which justified drastic action. The evil aimed at, the benefit accruing to the public, were proportionate to the stringency of the rule.

One would scarcely have the temerity to suggest that the ordinance had no reasonable relation to the end sought to be accomplished.

In none of the cases cited by the appellee is it adjudged that discretion arbitrarily exercised is not a subject of judicial investigation.

IT HAS BEEN REPEATEDLY HELD THAT THE REASONABLENESS OF ANY LEGISLATIVE OR ADMINISTRATIVE ACTION WHICH INVOLVES AN INTERFERENCE WITH

PROPERTY RIGHTS IS EMINENTLY A SUBJECT OF INVESTIGATION BY THE COURTS.

Yick Wo v. *Hopkins*, 118 U. S. 356;
Chicago, Milwaukee & St. Paul R. R. v. *Minnesota*, 134 U. S. 418;
Adams v. *Tanner*, 244 U. S. 590;
Mississippi R. R. Comm. v. *The Mobile & Ohio R. R. Co.*, 244 U. S. 388;
Buchanan v. *Warley*, 245 U. S. 60;
American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94.

The case of *Yick Wo* v. *Hopkins*, *supra*, arose under an ordinance of the City of San Francisco which gave the Board of Supervisors power to issue licenses for the conduct of laundries, and provided that it should be unlawful for any person to engage in the laundry business without having first obtained the consent of the Board of Supervisors, except the business be conducted in a building constructed either of brick or stone. The Court held that the action of the Board of Supervisors in consistently refusing licenses to the Chinese population of the city was an unlawful discrimination, depriving them of their property and denying them the equal protection of the laws.

In *Mississippi R. R. Commission* v. *Mobile & Ohio R. R. Co.*, *supra*, the reasonableness of orders of the State Railroad Commission, an administrative body, were attacked. In response to the contention that the Court should not interfere with the discretionary powers of the Commission, the Court, by Mr. Justice Clarke, said at page 391:

> "This power of regulation, if it is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the

public service, passes beyond lawful bounds and is void because repugnant to the due process of law provision of the Fourteenth Amendment to the Constitution of the United States."

In *Chicago, Milwaukee & St. Paul R. R.* v. *Minnesota,* the Railroad and Warehouse Commission of the State of Minnesota had prescribed rates and tariffs which it directed the railroad company to adopt.

The Commission was given the power to compel any common carrier to adopt such rates as the Commission shall declare to be equal and reasonable.

The railroad company refused to adopt the rates prescribed, and the Attorney General of the state applied to the State Supreme Court for a writ of mandamus to compel the railroad to change its schedule in compliance with the recommendation of the Commission. The company answered that the rates were not reasonable.

The State Supreme Court held that under the act of the Minnesota legislature, the findings of the Commission were conclusive as to lawfulness, equality and reasonableness of charges, and that in proceedings to compel compliance with the rates prescribed by the Commission, the law neither contemplated nor allowed any inquiry to be made as to their equality and reasonableness *in fact.* The Supreme Court of the United States held that the statute as so construed conflicted with the Federal Constitution.

In the late case of *Buchanan* v. *Warley, supra,* plaintiff in error, brought an action in the Chancery branch of the Jefferson Circuit Court of Kentucky for the specific performance of a contract for the sale of certain real estate situated in the City of Louisville. The offer in writing to pur-

chase the property in issue contained a proviso that the purchaser was to acquire the property for the purpose of having erected thereon a house which he proposed to make his residence and the agreement specifically recited that the purchaser would not be required to accept the deed for the property unless he had the right to occupy said property for residential purposes, under the laws of the State of Kentucky. This offer was accepted by the plaintiff.

To the action for specific performance the defendant, by way of answer, set up the condition above set forth and that he was a colored person, and that pursuant to an ordinance of the City of Louisville the property described in the contract was forbidden to colored persons for residential purposes. The ordinance referred to provided that it should be unlawful for any colored person to move into and occupy as a residence, place of abode or to establish as a place of public assembly, any house upon any block upon which the greater number of houses are occupied as residences, places of abode or places of public assembly by white people than are occupied as residences, places of abode or places of assembly by colored people.

It was shown that at the time of making the contract there were on the block in which the lot in controversy was in fact ten residences, eight of which were occupied by white people while only two were occupied by colored people.

In reply to this answer the plaintiff set up, among other things, that the ordinance was in conflict with the 14th amendment to the Constitution of the United States and was not a defense to the action for specific performance of the contract.

The ordinance was sought to be justified under the authority of the police power of the State. It

was said that such legislation tended to promote the public peace by preventing racial conflicts; that it tended to maintain racial purity and to prevent the deterioration of property owned and occupied by white people which deterioration was sure to follow the occupancy of adjacent premises by persons of color. In answer to this contention Mr. Justice Day, delivering the opinion of the Court said at page 74:

> "The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health safety and welfare, is very broad, as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise of this power embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases."

and again at page 81:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

The ordinance in question was held "in direct violation of the fundamental law enacted in the

14th amendment of the constitution preventing inference with property rights except by due process of law."

Justifiable and commendable as was the avowed purpose of the regulation, that fact did not determine its validity under the constitution.

The purpose of the regulation in the case at bar is a prevention of weighing deceptions. The means prescribed to accomplish such purpose is the inclusion of an automatic compensating device in scales covered by the regulation. The test is whether or not such means bear a reasonable relation to the purpose sought to be accomplished and are reasonably necessary to that end.

The particular deceptions enumerated by defendant, have been shown to bear no relation to automatic compensation.

The objections of the first class were not considered by defendant and were not persuasive of the regulation. He testified that these were not his objections (p. 61). The objections of the second class, which it is the purpose of the rule to prevent, could all be obviated without conforming the scale to the regulation. The regulation, therefore, is not a means bearing a reasonable relation to the prevention of these defects. It is not aimed at them and does not cure them.

That the automatic device is not reasonably necessary to a correction of these alleged defects is testified to by defendant's own expert, who believed that automatic compensation was not a requirement which any honest and fair-minded official had a right to insist upon.

POINT III.

The equal protection of the law clause in the 14th Amendment to the Constitution.

We will assume, for the purpose of argument upon this point, that the defendant's regulation has a reasonable relation to the object sought to be accomplished, and hence does not deprive complainant of its property without due process of law.

We will assume that the manual device with which complainant's scale is equipped may be used for the apparent correction of any number of errors not occurring on account of changes in temperature, and that such use is a grossly improper one, resulting in error; that the position of the device upon the scale presents a splendid opportunity for fraud, and that the scale can be so readily adjusted that detection is positively impossible, and that all these defects would be cured if an automatic thermostat were employed; that the scale is defective, inaccurate, vicious and a menace to the public.

But assuming all of these things, we contend that the limitation of the rule to computing scales denies to complainant the equal protection of the laws. The judges of the Circuit Court of Appeals, whose decision we cite, not as an official judicial enunciation, but as an expression of opinion by impartial and unbiased minds, stated:

> "All spring scales and all spring and lever scales and all computing scales which do not also use a lever are affected by changes in temperature. Cold tends to stiffen the spring

and make the scale show less than the correct weight, while heat relaxes it and tends to make it show a greater than the correct weight. *The computation of the price feature has nothing whatever to do with the accuracy of the scale.* The computing scale indicates automatically the price of the articles weighed just as in the case of all other scales the merchant calculates it mentally with reference to the weight shown by the scale. * * * The defendant's objection to the complainant's scale is not that it is inaccurate or incapable of being kept accurate. On the contrary, the District Judge has found that it is an excellent instrument and that its mechanical thermostat is even better than the automatic thermostat. The objection is that it is more capable of being fraudulently altered mechanically by a dishonest merchant than is a scale having an automatic thermostat. *Any and all scales are capable of being fraudulently tampered with.*"

Defendant's witness Reichmann testified:

"The deliberate things that I have mentioned as well as the accidental things might as well happen to the Dayton scale as it might to the Standard. To every one of them" (p. 85).

The appellee in his brief concedes (p. 4):

"All spring scales have the fault of varying in accuracy as the spring contracts and expands through changes in temperature and loses elasticity under increasing loads. In simple spring scales these variations are ordinarily corrected by manually tightening or loosening the spring with a screw set into the the spring. This defect is universal in spring scales and concededly exists in the appellant's device."

It thus, unquestionably appears that ordinary spring scales, computing spring scales and non-computing spring scales are as susceptible to error because of variations in temperature as are computing spring and lever scales. We contend, therefore, that the singling out of scales of the type manufactured by the complainant and prescribing that automatic compensation shall be provided therefor, while other scales pregnant with the same evil are excluded from the operation of the rule, denies to complainant the equal protection of the law.

The defendant testified:

> *"If you should cover the computing card on the complainant's scale, it still has the mechanical device which I say is conducive to the perpetration of fraud"* (p. 60).

And again:

> *"This specification affects only scales which have a computing card on it. This specification affects only spring and lever combined computing scales. If the computing card were to be taken off of the scale and hung on the wall, my objection with regard to the error in weight along the line of the computing chart would not be obviated on the Standard scale. It would not violate my rule"* (p. 62).

Here then, is a discrimination which admittedly is without reason.

A removal of the computing card from the scale would not obviate defendant's objection. It would not relieve the scale of vices which are alleged to exist and which the rule seeks to prevent, yet this scale, with the computing card so removed, would not be prohibited by the regulation.

We contend that complainant's scale with the

computing card and the same scale without the computing card, are similarly situated; in fact, in so far as the defendant's regulation is concerned, they are identically situated, for the variation of temperature which affects one, *equally* and *identically* affects the other. Consequently, a regulation designed to correct for those variations caused by temperature changes which affects one and excludes the other, is not a legitimate and constitutional exercise of the power of classification.

Connolly v. *The Union Sewer Pipe Company*, 184 U. S. 540;
Cotting v. *Goddard*, 183 U. S. 79;
Southern R. R. Co. v. *Green*, 216 U. S. 400.

Connolly v. *The Union Sewer Pipe Company*, *supra*, involved a construction of a statute of the State of Illinois which was directed against trusts and conspiracies against trade.

The Union Sewer Pipe Company brought its action against Connolly upon two promissory notes given on account of the purchase by the defendant of sewer pipe commonly known as "Standard Akron" pipe at prices agreed upon between the parties. Connolly set up as a defense to the company's cause of action, the statute of Illinois which defined illegal trusts and monopolies and provided that any contract or agrement in violation of the provisions of the act should be absolutely void and not enforceable either in law or in equity. Connolly set up that the plaintiff was a trust doing business as such in the State of Illinois contrary to the Illinois statute in question. The pipe company in avoidance of Connolly's special defense, contended that the Illinois statue was in violation of the Fourteenth Amendment of the Federal Con-

stitution, in that it provided: "Subdivision 9. *The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.*" The pipe company claimed that the exclusion from the operation of the act of dealers in agricultural products constituted a discrimination against those engaged in business other than the sale of agricultural products and live stock in the hands of producers and raisers.

The pipe company was upheld by the Supreme Court of the United States.

Mr. Justice Harlan, delivering the opinion of the Court, said, at pp. 558 and 559:

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, *a statute of a state even when avowedly enacted in the exercise of its police powers must yield to that law.* No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment whatever may be the source from which the power to pass such enactment may have been derived. * * * The state has undoubtedly the power, by proper legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws,

they must be deemed unconstitutional and void. (Citing cases.) What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case but upon this general question we have said that the guarantee of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances' (Citing cases). We have also said 'The Fourteenth Amendment in declaring that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; *that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances;* that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." (Italics ours.)

And again, at page 563:

> "It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute, making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary and plainly denies the equal protection of the laws to those against whom it discriminates."

The defendant cites *Central Lumber Company* v. *South Dakota*, 226 U. S. 157, as authority that the rule in question in this case does not deny to complainant the equal protection of the laws. That case is a very apt one to point out the distinction between classifications such as were there held permissive and classifications such as were condemned in the *Connolly* case. In the *Central Lumber Company* case, the statute of the State of South Dakota forbade the selling of goods at a lower rate in one place than in another for the purpose of destroying the competition of any regularly established dealer in such commodity or to prevent the competition of any person who in good faith intended and attempted to become such dealer. The lumber company contended that the statute was contrary to the Fourteenth Amendment on the ground that it denied to it the equal protection of the law. The particular specification was that it affected the conduct of a particular class—those selling their goods in two places in the state—and was intended for the protection of only a particular class—regularly established dealers.

It was urged that to punish selling goods in one place lower than in another in effect selected the class of dealers that had two places of business and in real fact was a blow aimed at those having several lumber yards, and was in the interests of independent dealers.

In respect to these contentions of the lumber company, the Court said, at page 160:

> "The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

Obviously, business enterprises operating in two different localities are not similarly situated with those selling goods in but one place in the state. The act could not affect the small independent dealer because by its very terms it prohibits the selling of goods at a lower rate in one place than in another.

In the *Connolly* case, persons dealing in agricultural products or live stock while in the hands of the producer or raiser were found to be as much a menace to independent competition as other corporations.

These two cases were both directed against trusts and monopolies, so that the evil sought to be done away with was equal.

Assuming, in the case at bar, that the scale complained of is a defective and vicious one, that fact

does not justify the exclusion from defendant's rule of other scales equally defective and vicious.

Certainly trusts and monopolies which were the subject of regulation or prohibition in the *Connolly* case are as great a menace to the public as faulty weighing devices. Organizations formed to stifle competition have been recognized as evils from time immemorial.

In the case of *Cotting* v. *Goddard*, 183 U. S. 79, it was held that a statute of the State of Kansas which imposed a greater burden upon a corporation doing business of a certain amount than upon a similar but smaller business was unconstitutional. The act in question provided that it should be unlawful for any person or corporation owning or operating a public stockyard to deliver less than two thousand pounds for a ton of hay or to sell the same at more than one hundred per cent. above the average market price or value of such hay upon the markets, that it should be unlawful for such persons to sell and deliver less than seventy pounds of corn in the cob for a bushel, or less than fifty-six pounds of shell corn for a bushel, or to charge or sell the same at more than one hundred per cent. above the market price.

A sale of dead stock in the yards was also prohibited, and the maximum rates to be charged for driving, yarding, watering and weighing cattle, calves, hogs and sheep, were fixed. The act exempted from its operation all except those who for the preceding twelve months had an average daily receipt of not less than one hundred head of cattle or three hundred head of hogs or three hundred head of sheep.

The United States Supreme Court held that this exemption was an arbitrary selection which could

not be justified by calling it classification. This case is directly in point.

The right of the state to fix rates for a corporation engaged in the business of the public or in which the public has an interest has been long recognized *Munn* v. *Illinois*, 94 U. S. 113, but the state cannot regulate a business by an enactment which does not apply to all other businesses similarly situated.

In *Southern R. R. Co.* v. *Green*, 216 U. S. 400, it was held that a foreign railway corporation which had come into the State of Alabama in compliance with its laws and had therein acquired property of a fixed and permanent nature, upon which it had paid all taxes levied by the state, was a person within the jurisdiction of the state and as such protected by the equal protection of the laws clause of the United States Constitution against the imposition of an additional franchise tax for the privilege of doing business within the state, where no such tax was imposed upon domestic corporations carrying on a precisely similar business. Mr. Justice Day, delivering the opinion of the Court, said, at page 410:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in like situations."

And at page 417:

> "While reasonable classification is permitted, without doing violence to the equal

protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

It is evident that the case of *Schmidinger* v. *Chicago*, 226 U. S. 547, has no application upon this point.

In the State Court, Schmidinger had contended that the ordinance violated by him was prohibited by the equal protection of the laws clause of the Fourteenth Amendment. This contention was abandoned in the United States Supreme Court. The Court expressly stated that they did not consider this point.

There was no discrimination in the *Schmidinger* case. The ordinance did not provide that rye bread should be made of a certain weight and wheat bread not, or discriminate between long loaves and short loaves. It included all bread, and the Court held that it was a reasonable regulation to protect the community against short sales of bread.

Defendant has sought to justify his discrimination against computing scales upon the theory that, as the computing chart is divided into penny graduations, slight error is multiplied in the money value indications of the higher priced commodities.

But there is no reasonable distinction between automatic multiplication and mental multiplication. Whether a dealer, weighing 4½ pounds of a 64 cent per pound commodity, upon a scale one ounce fast computes the price on paper and exacts $2.92 for a purchase, the true price of which

is $2.88 or charges $2.92 as computed by the scale, makes no difference. In either case the customer loses 4 cents.

Defendant contends that the division of ounces into pennies is viscious as slight error, error of less than one ounce, will be indicated by the difference of one complete graduation on the chart of a computing scale. For instance at 64c per pound an error of ¾ of an ounce would cause a difference of three complete penny graduations and thus increase the price three cents, while on a simple pound and ounce scale the difference between the true and the indicated weight would be less than one complete graduation. But defendant testified that the user of the non-computing scale reads to the nearest graduation (p. 63). Hence a three-quarter ounce error would be read as a full ounce and the customer would lose four instead of three cents.

But if the computing chart is a legitimate objection the rule should apply to all computing scales, to spring computing scales which do, as well as those which do not, combine the use of a lever.

CONCLUSION.

The rule is void and should be so declared.

Respectfully submitted,

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C5135

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STANDARD COMPUTING SCALE COMPANY, LIMITED, *v.* FARRELL, AS STATE SUPERINTENDENT OF WEIGHTS AND MEASURES OF THE STATE OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 228. Argued March 14, 1919.—Decided May 5, 1919.

A statement to the effect that all scales of a certain kind must be equipped with automatic devices, to compensate for changes of temperature, appearing as an item in a "bulletin of instruction and information to dealers, and weights and measures officials," issued by the New York Superintendent of Weights and Measures, was acted upon by certain county and city sealers of weights, with resulting injury to the business of the plaintiff, a manufacturer of scales of the kind specified but not equipped with such devices. *Held*, considering the Superintendent's functions and powers under the New York law, and the purpose of the statement, that it was educational and advisory merely, not binding on the city and county sealers and not a rule or regulation of a legislative character such as might impair the plaintiff's constitutional rights under the Fourteenth Amendment or the commerce clause. P. 573.

242 Fed. Rep. 87, affirmed.

THE case is stated in the opinion.

Mr. Herbert C. Smyth, with whom *Mr. Frederic C. Scofield* and *Mr. Frederick W. Bisgood* were on the briefs, for appellant.

Mr. Edward G. Griffin, Deputy Attorney General of the State of New York, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, was on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

By the statutes of New York a sealer of weights and measures is appointed in every county and every city by the local authorities with the duty, among other things, to keep safely the standards and to seal and mark such weights as correspond with the standards in his possession. The statutes provide also for a State Superintendent of weights and measures with, among other things, a like duty to keep the state standards, and "where not otherwise provided by law" to "have a general supervision of the weights, measures and measuring and weighing devices of the state, and in use in the state." General Business Law of New York, sections 11–15, Laws 1909, c. 25, amended 1910, Laws 1910, c. 187. Under a specific appropriation he publishes and distributes "bulletins of instruction and information to dealers, and weights and measures officials." Laws 1914, c. 521, p. 2093. In the bulletin for August, 1914, there appeared, among other matter, the following item:

"Specifications.

"Automatic Computing Scales.

"All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance and throughout the whole range of weight graduations."

The Standard Company manufactures a combination spring and lever computing scale which was then being used and sold in New York. It is equipped with a compensating device which is not automatic. Because of these "specifications," some county and city sealers of weights neglected to seal scales of plaintiff's make and warned scale users to discontinue the use thereof. A state inspector, who was a subordinate of the State Superintend-

ent, also marked some of these scales "slow and faulty." As a result, the Standard Company's business in New York was injured; sales diminished and collections for scales theretofore sold became difficult. The Standard Company contends that its scales with a mechanical compensating device are at least as trustworthy as those of its competitor with the automatic device; and it presented these views to State Superintendent Farrell both before the "specifications" were issued and thereafter. Failing to secure a withdrawal of the "specifications," it brought, in February, 1915, this suit in the District Court of the United States for the Southern District of New York against the State Superintendent, setting forth, in substance, the facts above stated and praying that the issuing of the "specifications," which it termed a "rule," be declared an invalid exercise of the police power of the State and their enforcement enjoined on the ground that the rule violates the Federal Constitution, in that it impairs the obligation of contracts, interferes with interstate commerce, abridges the privileges and immunities of a citizen, deprives the plaintiff of property without due process, and denies to it equal protection of the laws. An answer was filed; and upon full hearing on the evidence the bill was dismissed on the merits. 242 Fed. Rep. 87. The Circuit Court of Appeals affirmed the decree; but, at appellant's request, the mandate was later withdrawn and the appeal dismissed for want of jurisdiction; because it appeared that the jurisdiction of the District Court had been invoked solely under § 24, paragraph 14, of the Judicial Code, on the ground that the defendant's "rule" was unconstitutional. *Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305, 318. Thereupon the case was brought here by direct appeal under § 238 of the Judicial Code.

No question is made as to the constitutionality of the statute creating the office of State Superintendent and defining his duties. The attack is upon the "specifica-

tions" in the bulletin which plaintiff assumes are a regulation, that is, a law. Its contention is that the so-called "rule" is not a proper exercise of the police power, and is void; because it is arbitrary and unreasonable, because it unjustifiably discriminates against plaintiff's product, and because it interferes with interstate commerce. The claim that it impairs the obligation of contracts is not now insisted upon.

The "specifications" were not published as a regulation purporting to prescribe a course of action to be enforced by the power of the State. They embody, as the evidence shows, the result of prolonged investigation and extensive experimentation; and formulate the conclusion reached by the State Superintendent that every known automatic computing scale without an automatic compensating device is likely to mislead the customer who purchases at retail. In other words, the vice in this kind of scales was found by him to be generic; and as the objection was not one due to a defect of an individual machine, it was deemed useless to make individual tests. The "specifications" are a law only in the sense that every truth of general application may be spoken of as a law. If they may be termed a rule, it is only in the sense that they furnish a guide for the action of those interested. That is, the function of the "specifications" is educational and, at most, advisory.

The item was one appropriate for a bulletin "of instruction and information to dealers, and weights and measures officials." That such was its purpose is shown also by the other items contained in the same issue of the Bulletin. In the pages preceding the "specifications" here in question, was one item giving elementary information as to how prosecutions for violation of the General Business Law may be conducted, and two recent opinions of the Attorney-General of New York addressed to the State Superintendent. The first concerned the power of

local magistrates to punish for violation of that law, the other the right to mark containers in terms of the metric system. Following the "specifications" in question are two more opinions of the Attorney-General and the opinion of a municipal court. The last item of the Bulletin is entitled "Specifications—Measuring Pumps," and conveys useful information concerning automatic measuring devices. The information given in the "specifications" complained of may, as the plaintiff contends, be incorrect, the instruction may be unsound, and, if it is so, may be mischievous and seriously damage the property rights of innocent persons. But the opinions and advice, even of those in authority, are not a law or regulation such as comes within the scope of the several provisions of the Federal Constitution designed to secure the rights of citizens as against action by the States.

If the State Superintendent had undertaken to introduce a regulation legislative in character, that is, to prescribe rules of action which the city and county sealers would be forced to follow, and to prohibit the use in the State of scales not sealed in accordance with his regulations, he would have exceeded his powers; for the few conferred upon him are not of that character. The General Business Law substantially as enacted in 1909, provided by § 11 that: "The state superintendent of weights and measures shall take charge of the standards adopted by this article as the standards of the state; cause them to be kept in a fire-proof building belonging to the state, from which they shall not be removed, except for repairs or for certification, and take all other necessary precautions for their safe-keeping. He shall maintain the state standards in good order and shall submit them once in ten years to the national bureau of standards for certification. He shall correct the standards of the several cities and counties, and, as often as once in five years, compare the same with those in his possession, and where not otherwise pro-

vided by law he shall have a general supervision of the weights, measures and measuring and weighing devices of the state, and in use in the state." The statutes give the State Superintendent no control of county or city sealers. He does not appoint them and they are, in no respect, his subordinates. The powers which they now exercise are substantially the same as those conferred upon them by the Colonial Act of June 19, 1703,[1] which created those offices. Section 11 of the General Business Law was a reënactment of § 11 of the Domestic Commerce Law, Laws 1896, c. 376; and the latter was substantially a reënactment of § 17 of c. 134 of the Laws of 1851, which act created (by § 16) the office of State Superindentent.[2] Section 11 as enacted in 1909 was amended (Laws 1910, c. 187) so as to prescribe additional specific duties of the State Superintendent.[3] But none of these

[1] Report upon Weights and Measures, by John Quincy Adams, Secretary of State, February 22, 1821, p. 189.

[2] An Act passed February 2, 1804, had provided that the Secretary of State should be *ex officio* state sealer of weights and measures and that "from time to time, as occasion may require," "one assistant state sealer" might be appointed. Report upon Weights and Measures, by John Quincy Adams, Secretary of State, February 22, 1821, p. 194.

[3] "He shall upon the written request of any citizen, firm, corporation or educational institution of the state, test or calibrate weights, measures, weighing or measuring devices and instruments or apparatus used as standards in the state. He, or his deputies or inspectors by his direction, shall at least once annually test all scales, weights and measures used in checking the receipt or disbursement of supplies in every institution under the jurisdiction of the fiscal supervisor of state charities and he shall report in writing his findings to said fiscal supervisor and to the executive officer of the institution concerned; and at the request of said officers the superintendent of weights and measures shall appoint in writing one or more employees, then in actual service, of each institution, who shall act as special deputies for the purpose of checking the receipt or disbursement of supplies. He shall keep a complete record of the standards, balances and other apparatus belonging to the state and take receipt for the same from

is legislative in character; and the enumeration of them serves rather to limit than to enlarge the meaning of the clause, giving "general supervision of the weights . . . in use in the state."

If the "specifications" had been issued as a regulation, that is, a law, we might have been called upon to enquire whether it was a proper exercise of the police power or was, as plaintiff contends, void because arbitrary and unreasonable, or because it was discriminatory, or as interfering with interstate commerce. For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission. *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 286–288; *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S. 510; *Grand Trunk Western Ry. Co.* v. *Railroad Commission of Indiana*, 221 U. S. 400, 403. But since the "specifications" are not in the nature of a law or regulation, the prohibitions of the Federal Constitution cannot apply.

The District Court did not err in dismissing the bill; and its judgment is

Affirmed.

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his successor in office. He shall annually during the first two weeks of January make to the legislature a report of the work done by his office. The state superintendent, or his deputies or inspectors by his direction, shall inspect all standards used by the counties or cities at least once in two years and shall keep a record of the same. He, or his deputies or inspectors at his direction, shall at least once in two years visit the various cities and counties of the state in order to inspect the work of the local sealers and in the performance of such duties he may inspect the weights, measures, balances or any other weighing or measuring appliances of any person, firm or corporation."